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# Fueling the Terrorist Fires with the First Amendment

## RELIGIOUS FREEDOM, THE ANTI-LGBT RIGHT, AND INTEREST CONVERGENCE THEORY

*Kyle C. Velte*<sup>†</sup>

“Whose house is of glasse, must not throw stones at another.”<sup>1</sup>

“If we wish to inspire the peoples of the world whose freedom is in jeopardy, if we wish to restore hope to those who have already lost their civil liberties, . . . we must correct the remaining imperfections in our practice of democracy.”<sup>2</sup>

### INTRODUCTION

The past twenty years have seen significant victories for LGBT civil rights in both courthouses and legislatures alike. Many say that these victories culminated in 2015 in *Obergefell v. Hodges*,<sup>3</sup> in which the United States Supreme Court held that same-sex couples share in the fundamental right to marry under the Fourteenth Amendment to the United States Constitution.<sup>4</sup> *Obergefell* is not a panacea for the LGBT community, however. Approximately twenty-eight states do not have an antidiscrimination statute that includes sexual orientation

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<sup>1</sup> THE YALE BOOK OF QUOTATIONS 613 (Fred R. Shapiro ed., 2006) (citing GEORGE HERBERT, OUTLANDISH PROVERBS (1640)).

<sup>2</sup> Harry S. Truman, Special Message to the Congress on Civil Rights (Feb. 2, 1948), <http://www.presidency.ucsb.edu/ws/?pid=13006> [<https://perma.cc/TBQ3-DVC2>].

<sup>3</sup> 135 S. Ct. 2584 (2015).

<sup>4</sup> *Id.* at 2598–99, 2602–03.

or gender identity (SOGI)<sup>5</sup> within its protected classes; in these states, an LGBT person may get married on Sunday but then be denied goods or services in a public accommodation on Monday based on his or her sexual orientation or gender identity.<sup>6</sup>

While *Obergefell* certainly marked a watershed moment for LGBT Americans and their allies, anti-LGBT sentiment continues to run deep and strong in the United States. For example, since *Obergefell*, a wave of explicitly anti-LGBT laws have been proposed or passed in several states—these laws include “bathroom bills” that target transgender people and bills that expressly allow for-profit businesses to discriminate against LGBT people based on religious beliefs.<sup>7</sup> Moreover, in the approximately twenty states, as well as the District of Columbia, that *do* have antidiscrimination statutes that prohibit discrimination against LGBT people in public accommodations,<sup>8</sup> marriage equality has strengthened the backlash against LGBT equality. This backlash is occurring when for-profit businesses, such as photographers, bakers, and florists, assert that they should be exempt from complying with these antidiscrimination

<sup>5</sup> The acronym SOGI is commonly used as shorthand for the phrase “sexual orientation and gender identity.” *SOGI*, ALL ACRONYMS, [https://www.allacronyms.com/SOGI/Sexual\\_Orientation\\_and\\_Gender\\_Identity](https://www.allacronyms.com/SOGI/Sexual_Orientation_and_Gender_Identity) [<https://perma.cc/N7UL-P78J>]. The terms “sexual orientation and gender identity” and “SOGI” will be used interchangeably throughout this article depending on the context.

<sup>6</sup> Arlene Zarembka, *Advising Same-Sex Couples After Obergefell and Windsor*, GP SOLO (2015), [http://www.americanbar.org/publications/gp\\_solo/2015/july-august/advising\\_samesex\\_couples\\_after\\_obergefell\\_and\\_windsor.html](http://www.americanbar.org/publications/gp_solo/2015/july-august/advising_samesex_couples_after_obergefell_and_windsor.html) [<https://perma.cc/7E82-J7DN>]; see also Jay Kaplan, *SCOTUS Ruling Won't Be the Last Word on Gay Rights*, DETROIT FREE PRESS (June 26, 2015), <http://www.freep.com/story/opinion/2015/06/26/gay-rights-fight-continues/29291829/> [<https://perma.cc/B22F-A84D>] (“[A] favorable ruling on marriage doesn’t guarantee that the court will rule that discriminatory laws against LGBT people should be given a higher level of constitutional scrutiny . . . . And then there’s RFRA . . . and all of its assorted iterations. RFRA-style bills are quickly gaining popularity around the country as the go-to tactic for anti-gay forces seeking to continue to discriminate even after the SCOTUS ruling.”).

<sup>7</sup> See, e.g., Michael Hiltzik, *The Supreme Court’s Awful Hobby Lobby Decision Just Spawned a Very Ugly Stepchild*, L.A. TIMES (Aug. 19, 2016), <http://www.latimes.com/business/hiltzik/la-fi-hiltzik-hobby-child-20160819-snap-story.html> [<https://perma.cc/VNY6-UHBB>]; Jason Millman, *The Ongoing Hobby Lobby Battle: Who Else Can Get an Exemption?*, WASH. POST (Oct. 22, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/10/22/the-ongoing-hobby-lobby-battle-who-else-can-get-an-exemption/> [<https://perma.cc/VV6Q-JERN>]; *Hobby Lobby’s Slippery Slope*, BOS. GLOBE (Aug. 29, 2016), <https://www.bostonglobe.com/opinion/editorials/2016/08/29/hobby-lobby-slippery-slope/CFUoCJoZ1asqQXMg2ufOOP/story.html> [<https://perma.cc/6SBU-Y5VA>]; Elliott Minberg, *Hobby Lobby Strikes Again as Right-Wing Activists Seek Exemptions from Birth Control and Marriage Laws*, RAW STORY (Oct. 1, 2015), <http://www.rawstory.com/2015/10/hobby-lobby-strikes-again-as-christians-seek-exemptions-from-birth-control-and-marriage-laws/> [<https://perma.cc/Y6NG-G7FY>].

<sup>8</sup> See *Non-discrimination Laws*, MAP, [http://www.lgbtmap.org/equality-maps/non\\_discrimination\\_laws](http://www.lgbtmap.org/equality-maps/non_discrimination_laws) [<https://perma.cc/4H96-LXKD>]. Public accommodations are places open to the public, often where goods and/or services are rendered, such as restaurants, theaters, medical offices, hotels, and the like. See *id.*

laws based on the business owners' religious beliefs about LGBT people and same-sex marriage. These arguments have already been made in Colorado, New Mexico, New Jersey, and Oregon,<sup>9</sup> and are likely to arise in more states in the wake of *Obergefell* and the Supreme Court's decision in *Burwell v. Hobby Lobby*.<sup>10</sup> This is because *Hobby Lobby* held that a for-profit corporation has religious liberty, and can assert that religious liberty to be exempt from a generally applicable law.<sup>11</sup> Thus, many observed that the decision could open the courthouse doors to more claims of religious exemption by for-profit corporations, including requests for exemptions to antidiscrimination laws.<sup>12</sup>

Thus, the next battle in the legal and culture wars for LGBT civil rights will be fought over the answer to the question: When a for-profit business seeks a religious exemption from a state antidiscrimination law, which should prevail—the principle of religious liberty or the principle of antidiscrimination? This is referred to as the Antidiscrimination Question.<sup>13</sup> In addition, the next battle will include determining the fate of the new wave of anti-LGBT legislation in courts. Both are similar in that “religious freedom” serves as the basis of (1) the claims made by businesses that want to be exempt from state antidiscrimination statutes, and (2) the bills that emerged in 2016 that allow businesses to deny goods and services to LGBT people—a denial that most commonly occurs in the

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<sup>9</sup> See, e.g., *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 286 (Colo. App. 2015) (holding, in a case in which a baker refused to sell a wedding cake to a gay male couple, that application of Colorado's antidiscrimination act to require such sale did not violate the baker's First Amendment rights); *In re Klein*, Nos. 44-14, 45-14, 2015 WL 4868796, at \*19 (Or. Bureau Labor & Indus. July 2, 2015) (holding, in case in which a baker refused to sell a wedding cake to a lesbian couple, that Oregon's antidiscrimination statute did not violate the First Amendment or the Oregon Constitution's religious clauses); *Elane Photography, LLC v. Willcock*, 309 P.3d 53, 63–65 (N.M. 2013) (holding, in a case in which a photographer denied services to a lesbian bridal couple, that New Mexico's Religious Freedom Reformation Act could not be used as a shield to refuse service; thus, New Mexico's antidiscrimination statute required such services to be rendered); *Bernstein v. Ocean Grove Camp Meeting Ass'n*, Nos. CRT 6145-09, PN34XB-03008, 2012 WL 169302, at \*4–5 (N.J. Div. Civ. Rights Jan. 12, 2012) (holding, in a case in which a Methodist association refused to rent its pavilion to a same-sex couple for a civil union ceremony, that New Jersey's antidiscrimination law did not permit such refusal; application of the statute did not violate the First Amendment rights of the association).

<sup>10</sup> 134 S. Ct. 2751 (2014).

<sup>11</sup> *Id.* at 2759–60.

<sup>12</sup> See, e.g., sources cited *supra* note 7.

<sup>13</sup> Of course, what is at stake in answering the Antidiscrimination Question is not the existence of religious freedom per se, but rather whether the Religious Right should prevail in its quest for the right to discriminate against LGBT people under the guise of “religious liberty.” See generally Kyle C. Velte, *All Fall Down: A Comprehensive Approach to Defeating the Religious Right's Challenges to Anti-discrimination Statutes*, 49 CONN. L. REV. 1, 12 (2016).

context of same-sex weddings.<sup>14</sup> The driving force behind litigation of the Antidiscrimination Question and the new anti-LGBT laws is the Religious Right.<sup>15</sup>

There are three critical analytical axes of this issue: legal, policy, and normative/theoretical.<sup>16</sup> This article addresses the policy axis. It argues that courts and legislatures considering the Antidiscrimination Question should find that antidiscrimination laws trump claims of religious exemptions to such laws made by

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<sup>14</sup> Often, a business relies on a state Religious Freedom Restoration Act (RFRA) to support its argument that it is exempt from a state antidiscrimination law. See cases cited *supra* note 9. State RFRA usually are modeled after the federal RFRA, which forbids the federal government from substantially burdening “a person’s exercise of religion even if the burden results from a rule of general applicability” unless the federal government can demonstrate that the “application of the burden to the person (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000bb-1(a), (b) (2012). When a state does not have an RFRA, these businesses rely on the First Amendment, specifically its Free Speech and Free Exercise provisions. See, e.g., *Craig v. Masterpiece Cakeshop*, 370 P.3d 272, 286 (Colo. App. 2015) (holding, in a case in which a baker refused to sell a wedding cake to a gay male couple, that application of Colorado’s antidiscrimination act to require such sale did not violate the baker’s First Amendment rights), *cert. denied sub nom.*, *Masterpiece Cakeshop v. Col. Civ. Rights Comm’n*, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016) (en banc), *cert. granted*, 2017 WL 2722428 (U.S. July 26, 2017) (No. 15SC738). With regard to the new wave of anti-LGBT legislation, alleged religious liberty as a basis for such laws is always implicit and sometimes explicit. Compare H.B. 2, Gen. Assemb., 2d Extra Sess. (N.C. 2016) (containing no language about religious freedom), with H.B. 1523, 2016 Leg., Reg. Sess. (Miss. 2016) (titled Religious Liberty Accommodations Act, finding that “[l]eading legal scholars concur that conflicts between same-sex marriage and religious liberty are real and should be addressed through legislation” and directing that the State shall not take any discriminatory action against a business that, based on a sincerely held, anti-LGBT religious belief, declines to provide services or public accommodations in relation to a same-sex wedding); see also Michael Gordon et al., *Understanding HB2: North Carolina’s Newest Law Solidifies State’s Role in Defining Discrimination*, CHARLOTTE OBSERVER (Mar. 26, 2016), <http://www.charlotteobserver.com/news/politics-government/article68401147.html> [<https://perma.cc/85EY-4FSZ>] (“Conservative religious groups within North Carolina are taking some credit for getting HB2 passed into law, and pro-LGBT rights advocates note there is financial support from national groups with similar interests.”).

<sup>15</sup> The Religious Right is a leading voice of the anti-LGBT rights movement in the United States. It is an alliance of evangelical Protestant Christians and American Roman Catholics, whose goal is to stop and reverse these civil rights victories. I use this phrase as an umbrella term to describe organization such as Focus on the Family, the Alliance Defending Freedom, the Beckett Fund for Religious Liberty, the Liberty Counsel, the Freedom of Conscience Defense Fund, American Center for Law and Justice, United States Conference of Catholic Bishops, the Family Research Council, Concerned Women for America, the Faith & Freedom Coalition, the Council for National Policy, and the Liberty Institute. See generally FREDERICK CLARKSON, POLITICAL RESEARCH ASSOCS., WHEN EXEMPTION IS THE RULE: THE RELIGIOUS FREEDOM STRATEGY OF THE CHRISTIAN RIGHT 10–12 (2016), <http://www.politicalresearch.org/wp-content/uploads/2016/01/When-Exemption-is-the-Rule-PRA-Report.pdf> [<https://perma.cc/8UZN-V24R>]. The Religious Right, while the focus of this article, certainly is not the only model for Christianity in the United States. See, e.g., Kimberly Charles, *Sexism Is a “Family Value”*, 9 CARDOZO WOMEN’S L.J. 255, 258–59 (2003).

<sup>16</sup> For a discussion of the legal axis, see Velte, *supra* note 13.

for-profit corporations.<sup>17</sup> They should also find the new anti-LGBT laws passed in 2016 are unconstitutional. In addition, Congress and the approximately twenty-eight states that do not protect against SOGI discrimination should pass statutes expressly protecting LGBT people from discrimination in all areas of civil life, including public accommodations, housing, and employment.<sup>18</sup> The failure to expressly protect against SOGI discrimination also undermines U.S. foreign policy and threatens national security.<sup>19</sup>

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<sup>17</sup> The religious exemption claims in these cases are asserted under a state RFRA, the First Amendment, or both. *See, e.g., Masterpiece Cakeshop, Inc.*, 370 P.3d at 286 (asserting a claim under the First Amendment); *Elane Photography, LLC v. Wilcock*, 309 P.3d 53, 76 (N.M. 2013) (asserting claims under the New Mexico RFRA and the First Amendment). Twenty-one states have religious exemption laws, either through a statute or constitutional amendment. *See State Religious Exemption Laws*, LGBT MAP, [http://www.lgbtmap.org/equality-maps/religious\\_exemption\\_laws](http://www.lgbtmap.org/equality-maps/religious_exemption_laws) [<https://perma.cc/F8ZK-TMA7>] (providing a map of states with religious exemption laws). Most of these are modeled after the federal RFRA. *See* 42 U.S.C. § 2000bb-1(a)–(b) (2012).

<sup>18</sup> Protections are necessary at both the state and federal level to provide comprehensive formal equality for LGBT Americans—state laws can provide broader or more comprehensive protections than federal law in some instances. *See* Carolyn E. Coffey, *Battling Gender Orthodoxy: Prohibiting Discrimination on the Basis of Gender Identity and Expression in the Courts and in the Legislatures*, 7 N.Y. CITY L. REV. 161, 181 (2004) (noting that “some state courts . . . have held that the definition [of “sex”] intended by Congress does not necessarily apply to state anti-discrimination laws”). In the absence of a federal statute prohibiting SOGI discrimination, the EEOC and a number of courts and executive agencies have determined that sexual orientation discrimination is a form of sex discrimination prohibited by Title VII, the federal civil rights law that prohibits employment discrimination on the basis of sex, race, color, national origin, and religion. *See Facts About Discrimination in Federal Government Employment Based on Marital Status, Political Affiliation, Status as a Parent, Sexual Orientation, and Gender Identity*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/federal/otherprotections.cfm> [<https://perma.cc/R8RF-J86R>]; *see also Fact Sheet: Recent EEOC Litigation Regarding Title VII & LGBT-Related Discrimination*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, [https://www.eeoc.gov/eeoc/litigation/selected/lgbt\\_facts.cfm](https://www.eeoc.gov/eeoc/litigation/selected/lgbt_facts.cfm) [<https://perma.cc/E6AK-FT44>] (last updated July 8, 2016); *Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination Under Title VII*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, [https://www.eeoc.gov/eeoc/newsroom/wy sk/lgbt\\_examples\\_decisions.cfm](https://www.eeoc.gov/eeoc/newsroom/wy sk/lgbt_examples_decisions.cfm) [<https://perma.cc/EQ69-LU4W>]. The Title VII argument is that discrimination based on SOGI “run[s] afoul of Title VII’s historic prohibition against discrimination ‘because of sex.’” *See* Brief of Amici Curiae ACLU at 1, *Zarda v. Altitude Express, Inc.*, 15-3775-cv (2d Cir. Mar. 18, 2016), [https://www.aclu.org/sites/default/files/field\\_document/2016-03-18\\_zarda\\_proposed\\_amicus\\_brief.pdf](https://www.aclu.org/sites/default/files/field_document/2016-03-18_zarda_proposed_amicus_brief.pdf) [<https://perma.cc/V3U2-5QWR>]. Although some courts are accepting the EEOC’s position, LGBT people and our allies continue to push for clear, consistent, and explicit protections at the state, local, and federal level. *See generally* German Lopez, *Meet the Federal Agency Working to Stop Anti-LGBTQ Discrimination in the Workplace*, VOX (July 7, 2016), <http://www.vox.com/2016/7/7/12061622/eeoc-lgbtq-discrimination-work> [<https://perma.cc/SBZ3-8VTS>].

<sup>19</sup> The issue of audience is an important one to frame and contextualize this article. As a staunchly pro-LGBT-rights advocate, my primary intended audience for this article is those in state and federal legislatures; my secondary intended audience is judges, practicing attorneys, and legal academics. The overarching message to those audiences is, at its core, a simple one: The United States needs to stand by its messages of tolerance and equality both at home and abroad so that we, as a nation and as a world leader, avoid seeming hypocritical to our allies *and* to the terror groups that threaten U.S. security. Moreover, the answer to the question of who is the United States’ audience is important to frame and contextualize the article. The article contends that the United States’ audience

Since the 9/11 attacks, the United States has waged a War on Terror. By so doing, the United States explicitly seeks to rid the world of oppressive, theocratic regimes<sup>20</sup> in the Middle East and Northern Africa, such as ISIS, Al Qaeda, Iranian sharia law, and Boko Haram (this article refers to this list of groups which advocate for Muslim theocracy as the Extremist Islamic Terrorist Network, or EITN),<sup>21</sup> and replace them—through “nation building”<sup>22</sup>—with democracies created in the United States’ own image. Today, Islamic extremism is the principal national security threat to the United States; it represents the primary motivator of terrorism in the United

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is its allies *and* its enemies—*both* groups intently observe the legal and policy positions taken by the United States at home and abroad. As a result, the United States must be consistent, unwavering, and formidable on issues of equality and dignity, both within and without its borders. This is true even if there is a risk that, by preaching acceptance at home and abroad, we anger violent terror groups because we advocate for a position they expressly reject. On balance, this risk is less troubling than the alternative risk, namely that if the United States is hypocritical on its stance on LGBT civil rights at home vis-à-vis its stance on that issue abroad, it (1) loses legitimacy and integrity on the international stage, thus weakening its power to influence international politics and policies, and (2) fuels the terrorist fires by providing fodder for recruitment.

<sup>20</sup> A “theocracy” is commonly defined as a form of government in which religious leaders, rather than secular leaders, rule. *See, e.g., Theocracy*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/theocracy> [<https://perma.cc/8QR3-UAH4>].

<sup>21</sup> I use the phrase Extremist Islamic Terrorist Network, or EITN, throughout the article as shorthand for the group of nonstate, militant actors in the Middle East and Northern Africa, all of which share the common goal of “claiming exclusive political and theological authority over the world’s Muslims.” *See* Zachary Laub, *The Islamic State*, COUNCIL ON FOREIGN RELATIONS (Aug. 10, 2016), <http://www.cfr.org/iraq/islamic-state/p14811> [<https://perma.cc/UR63-YC32>]. The phrase and acronym are intended to describe the different groups of extremism Islamists whose goal is a Muslim theocracy based on sharia law in which mosque and state merge. The EITN includes ISIS (also known as the Islamic State, ISIL, and Daesh), Boko Haram, Al Qaeda, the Muslim Brotherhood, the Taliban, and Iran. *Id.* Iran, a recognized nation-state, is a constitutional, theocratic republic; its official religion is a particular school of Islam known as Twelver (Shi’a) Jaafari. *See* U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, ANNUAL REPORT 2014, at 59 (2014), <http://www.uscirf.gov/sites/default/files/USCIRF%202014%20Annual%20Report%20PDF.pdf> [<https://perma.cc/9MBB-GB57>]. Iran’s government discriminates against its citizens on the basis of religious beliefs and uses its religious laws to quash the views of human rights activists and journalists. *Id.* The United States “has not had formal diplomatic relations” with Iran since 1980 and “has imposed sanctions on Iran because of its sponsorship of terrorism . . . and for severe human rights and religious freedom violations.” U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, ANNUAL REPORT 2015, at 47–48 (2015), <http://www.uscirf.gov/sites/default/files/USCIRF%20Annual%20Report%202015%20282%29.pdf> [<https://perma.cc/PL5T-U46V>]. While there are some differences, and even rifts, between the groups (in particular, between ISIS and Al Qaeda), I use the phrase and acronym as a shorthand for those groups that believe in the overarching goal of achieving a Muslim theocracy. *See* Laub, *supra*.

<sup>22</sup> Generally, “nation building” as an enterprise is understood as “an accretion of activities designed to transform a state from a present pathological condition to a preferred future condition, one in which the state is a functioning participant in the world community, and within which the human dignity of the population is respected and protected.” Charles H. Norchi, *The Legal Architecture of Nation-Building: An Introduction*, 60 ME. L. REV. 281, 283 (2008) (footnote omitted).

States and abroad.<sup>23</sup> U.S. foreign policy simultaneously condemns the practices of these regimes—male supremacy, beheadings of those who hold minority religious beliefs, executions of gay men, and the denial of full equality to women—while also promoting the ideals of equality, religious plurality, and democracy both at home and abroad.<sup>24</sup> This prodemocratic messaging rests on America’s longstanding sense of exceptionalism—the notion that the country that emerged from the original colonies was exceptional, as compared to other nations, for its commitment to individual liberty, rationality, and empiricism.<sup>25</sup> Importantly, the United States strongly condemns the EITN’s goal of a Muslim theocracy; instead, the United States espouses that authentic religious pluralism is essential for a true democracy governed by the “rule of law.”<sup>26</sup>

To maintain its authority in the eyes of the international community when promoting the exceptional ideals of democracy, religious pluralism, and equality abroad, the United States must espouse those values within its borders. To do so, there is only one answer to the Antidiscrimination Question: Antidiscrimination protections trump claims of religious exemption made by for-profit corporations. Moreover, there is

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<sup>23</sup> See H.R. COMM. HOMELAND SEC., TERROR THREAT SNAPSHOT (2017), <https://homeland.house.gov/wp-content/uploads/2017/03/MarchTerrorThreatSnapshot-1.pdf> [<https://perma.cc/5NDP-W5X9>]; see also JAMES R. CLAPPER, SENATE ARMED SERVICES COMM., STATEMENT FOR THE RECORD: WORLDWIDE THREAT ASSESSMENT OF THE US INTELLIGENCE COMMUNITY 4 (2016), [https://www.armed-services.senate.gov/imo/media/doc/Clapper\\_02-09-16.pdf](https://www.armed-services.senate.gov/imo/media/doc/Clapper_02-09-16.pdf) [<https://perma.cc/B6JX-X724>] (“The Islamic State of Iraq and the Levant (ISIL) has become the preeminent terrorist threat because of its self-described caliphate in Syria and Iraq, its branches and emerging branches in other countries, and its increasing ability to direct and inspire attacks against a wide range of targets around the world.”).

<sup>24</sup> See STEVEN W. HOOK & JOHN SPANIER, AMERICAN FOREIGN POLICY SINCE WORLD WAR II, at xiii (20th ed. 2016).

<sup>25</sup> *Id.* at xv.

<sup>26</sup> Although there is no singular definition of the “rule of law,” it nonetheless generally is understood as “the preeminent legitimating political ideal in the world today.” Captain Dan E. Stigall, *The Rule of Law: A Primer and a Proposal*, 189 MIL. L. REV. 92, 93 (2006). The International Commission of Jurists defined it as

[t]he principles, institution and procedures, not always identical but broadly similar, which the experience and traditions of lawyers in different countries in the world, often themselves having varying political structures and economic backgrounds, have shown to be important to protect the individual from arbitrary government and to enable him to enjoy the dignity of man.

*Id.* at 104 (quoting INT’L COMM’N OF JURISTS, THE DYNAMIC ASPECTS OF THE RULE OF LAW IN THE MODERN AGE, REPORT ON THE PROCEEDINGS OF SOUTH-EAST AND PACIFIC CONFERENCE OF JURISTS, BANGKOK, THAILAND (1965)). That definition, supplemented by nine principles—(1) generally applicable laws, (2) clearly written laws, (3) laws known to or accessible by the public at large, (4) legal stability, (5) reasonable laws, (6) governmental conformity to laws, (7) an independent judiciary, (8) “open and fair hearings,” and (9) “limitations on . . . state actors”—fill out the definition of the rule of law as used in this article. *Id.* at 105–09.



only one answer to the question of whether the new anti-LGBT bills of 2016 are unconstitutional: they are.<sup>27</sup> These answers are required if the United States is to have legitimacy in the international sphere when it demands religious pluralism, gender equality, and equality for LGBT people from oppressive regimes abroad. If the United States does not “walk the walk” on these issues at home, its demand that other countries integrate these principles will ring hollow and hypocritical. To “walk the walk” at home, the United States must strongly reject the Religious Right’s attempt to form zones of exemption from antidiscrimination laws and its new wave of explicitly anti-LGBT laws grounded in Christianity.

In addition to undermining the power and legitimacy of U.S. foreign policy abroad, the failure to reject requests for religious exemptions to antidiscrimination laws poses a grave threat to national security.<sup>28</sup> The Extremist Islamic Terrorist Network looks for weakness within the United States and its policies. Inconsistency between what the United States says regarding freedom and democracy abroad, and what it actually does at home with respect to those principles, provides rich fodder for these terrorist groups to rally their followers and harm the United States and its citizens. The United States cannot condemn the EITN’s efforts to establish a Muslim theocracy abroad while allowing the Religious Right to create theocratic-like zones<sup>29</sup> of exemption within the United States without appearing inconsistent at best (and hypocritical at worst).

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<sup>27</sup> See, e.g., *Barber v. Bryant*, 193 F. Supp. 3d 677, 711 (S.D. Miss. 2016) (“The deprivation of equal protection of the laws is HB 1523’s very essence. It violates the Fourteenth Amendment.” (internal citation omitted)).

<sup>28</sup> See *infra* Section II.A.

<sup>29</sup> By describing the Religious Right as having goals that are “theocratic-like,” “quasi-theocratic,” “anti-Establishment,” or with other similar phrases, I do not intend to suggest that the Religious Right’s goal is an America governed by clergy rather than lawmakers; that provocative claim would be hyperbolic and inaccurate. See Mark C. Modak-Truran, *Beyond Theocracy and Secularism (Part I): Toward a New Paradigm for Law and Religion*, 27 MISS. C. L. REV. 159, 163 (2007). Rather, I suggest that the recent attempts by the Religious Right to roll back the gains of the LGBT civil rights movement seek to redefine religious freedom in ways that threaten religious pluralism in the United States, are grounded in their conservative Christian faith, and seek to impose this faith upon the larger secular society by claiming they are exempt from civil rights laws, as well as by introducing and passing anti-LGBT laws that are expressly grounded in their faith. In this way, the Religious Right’s agenda, while not seeking a complete American theocracy, certainly can be said to be seeking to create zones of exemption that rely on theocratic principles: The Religious Right seeks to elevate the rule of *its* God over the rule of law in wide swaths of civil life in America. In contrast, Iran is unequivocally a theocracy; its constitution provides that “[a]ll civil, penal financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria.” QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980] (1979) art. 4, [https://faculty.unlv.edu/pwerth/Const-Iran\(abridge\).pdf](https://faculty.unlv.edu/pwerth/Const-Iran(abridge).pdf) [<https://perma.cc/MYJ3-X43B>].

Arguments that foreign policy concerns should inform the resolution of domestic civil rights issues have been made before. A large part of the impetus behind the success of the national civil rights movement in the 1950s and 1960s was the United States' inconsistency—if not hypocrisy—in sending African American soldiers to fight against Hitler and his racist regime and the segregated America to which these soldiers of color returned. The racial civil rights victories are thus an example of what Professor Derrick Bell called the “interest convergence” dilemma—the dynamic through which a marginalized group gains civil rights because those in the majority have an interest in that outcome.<sup>30</sup> In the context of the racial civil rights movement, white, powerful men in the Johnson, Truman, and Eisenhower administrations, concluded that the end of legal segregation in schools and the passage of the Civil Rights Act were essential to the United States' ability to continue as a global power.

This article argues that a similar interest convergence occurs in the context of the Antidiscrimination Question, the challenges to the new anti-LGBT laws, and the need for express statutory prohibitions against SOGI discrimination. The largely white, heterosexual stakeholders in the United States' national security and foreign policy circles<sup>31</sup> should realize that if the Antidiscrimination Question and challenges to the new anti-LGBT laws are resolved in favor of antidiscrimination principles (and thus in favor of LGBT civil rights), the United States' foreign policy and national security interests will benefit. Conversely, answering the Antidiscrimination Question in favor of religious exemptions for corporations would create a clear and present threat to U.S. foreign policy and national security interests because the United States will be allowing on its soil what it actively condemns abroad—namely, the attempt by one

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<sup>30</sup> See Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

<sup>31</sup> I use the phrase “foreign policy and national security communities” to encompass federal and state legislators, the joint chiefs of staff, the president and his cabinet, diplomats, as well as those with decision-making power in the Pentagon, the Department of Homeland Security, the CIA, and other similar agencies that deal with issues of U.S. foreign policy and national security. Many, if not most, of these entities are part of the United States Intelligence Community, which is a “coalition of 17 agencies and organizations, including the ODNI, within the Executive Branch that work both independently and collaboratively to gather and analyze the intelligence necessary to conduct foreign relations and national security activities.” *Intelligence Community*, OFFICE OF THE NAT'L INTELLIGENCE, <https://www.dni.gov/index.php> [<https://perma.cc/2HWA-MQWV>]. There is a longstanding lack of gender and racial diversity in these communities. See, e.g., Ian Smith, *Obama Calls for Increased Diversity at National Security Agencies*, FEDSMITH (Oct. 5, 2016), <http://www.fedsmith.com/2016/10/05/obama-calls-for-increased-diversity-at-national-security-agencies/> [<https://perma.cc/JU7A-RR5P>].

religious group to replace the rule of law with the word of that group's god. Similarly, as long as there is no federal law expressly protecting against discrimination based on SOGI, and gaps in state law protections, American foreign policy will suffer, and the United States' national security will be threatened.

Part I of this article defines the concepts of foreign policy and national security and explains Bell's notion of "interest convergence," which provides the theoretical framework for the article. Part II analogizes the present-day fight for LGBT civil rights with the racial civil rights movement of the 1960s. It uses Bell's interest convergence theory to frame and explain the oft-ignored connection between the United States' foreign policy interests and the Supreme Court's decision in *Brown v. Board of Education*<sup>32</sup> and the subsequent passage of the Civil Rights Act.<sup>33</sup> Part III surveys the Religious Right's shifting narrative over the past six decades, the state of LGBT civil rights in the United States, and the current landscape of state "religious freedom" laws. It highlights the current tension between religious freedom laws and antidiscrimination laws—because both types of law serve democratic principles,<sup>34</sup> at least superficially, there exists a legal and normative debate about which should win out. It also reinforces the connection between the Religious Right's shifting narrative and its current-day quest for quasi-theocratic zones of exemption, disguised in the seemingly neutral concept of "religious freedom." That narrative has changed—from one of directly attacking LGBT people *as people* to one that characterizes members of the Religious Right as victims of an increasingly secular society whose laws prohibiting discrimination based on SOGI further victimizes these members and impermissibly infringes on their religious liberty. This part also summarizes the current foreign policy and national security concerns of the United States with regard to terrorism. Part IV draws parallels between the goal of the Religious Right and the goals of the EITN. The goal of the Religious Right—to establish an anti-Establishment regime<sup>35</sup> in

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<sup>32</sup> 347 U.S. 483 (1954).

<sup>33</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

<sup>34</sup> These principles include equality, citizen participation, political tolerance, accountability, transparency, free and fair elections, economic freedom, checks and balances on state power, a bill of rights, peaceful transitions of power, the protection of human rights, a multi-party system, and the rule of law. *THE AMAZING RACE, PRINCIPLES OF DEMOCRACY*, <http://www.lawanddemocracy.org/pdf/files/amazing.prin.pdf> [<https://perma.cc/G3HA-WYK6>].

<sup>35</sup> The Establishment Clause states, in pertinent part, that the government may not establish religion. U.S. CONST. amend. I. Because the Religious Right seeks to embed its particular religious beliefs into U.S. law and policy, those efforts cut against the Establishment Clause's prohibition on the establishment of religion, and are thus "anti-

which its religious beliefs are favored above other religious beliefs and the rule of law—is not unlike the EITN’s goal of a radical Islamic caliphate in the Middle East and Northern Africa. It builds on these parallels to make the interest convergence argument vis-à-vis the American LGBT civil rights movement and the foreign policy and national security communities. It contends that those in the U.S. foreign policy and national security communities should promote an LGBT civil rights agenda today based on the same foreign policy and national security reasons that garnered support for—and gave force to—the outcome in *Brown v. Board of Education* and subsequent passage of the Civil Rights Act of 1964. It also utilizes Bell’s interest convergence theory to frame and support the article’s prescriptive recommendations.

I. UNITED STATES FOREIGN POLICY AND NATIONAL  
SECURITY AND ITS CONNECTION TO INTEREST  
CONVERGENCE

A. *Foreign Policy and National Security*

The current state of the United States’ foreign policy and national security concerns began with the September 11, 2001, attacks on the World Trade Center, the Pentagon, and in rural Pennsylvania by the terrorist group Al-Qaeda. It was the 9/11 attack that caused the United States to launch its War on Terror. This section defines “foreign policy” and “national security,” describes the American approach to both, then provides a brief overview of world affairs and how they have shaped U.S. foreign policy and national security from 9/11 to the present day. Next, the section offers a historical example of an interest convergence, namely the interest convergence between civil rights advocates and the American foreign policy and national security communities—the American racial civil rights movement—to demonstrate that interest convergence theory can be operationalized for concrete legal changes for marginalized groups.

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Establishment.” It could be argued that the Religious Right is in fact seeking to *establish* a religion through government action—*its* religion—and thus its efforts are more accurately described as seeking an “Establishment regime.” While perhaps just a matter of semantics, the article uses “anti-Establishment” to underscore that what the Religious Right is attempting is anti-American at one of its most essential core foundational principles—the First Amendment’s proclamation of the separation of church and state—and is thus “anti-Establishment.”

Foreign policy is the totality of a state's "official external relations" in international relations.<sup>36</sup> Foreign policy is also defined as the plan or method by which a national government accomplishes objectives in its relations with foreign entities.<sup>37</sup> When a head of state, such as the U.S. president, makes statements about American foreign policy, it is more than one person's individual thoughts; rather, such a statement "tends to be widely vetted within the bureaucracy as an expression of a government's policy intentions."<sup>38</sup> Importantly, when one focuses on U.S. foreign policy, one also must focus on the internal affairs of America.<sup>39</sup> As President Harry Truman noted, to have legitimacy in its foreign policy actions and interactions, a country must present "evidence that we have been able to put our house in order."<sup>40</sup>

The United States works to achieve its foreign policy goals (and thus its national security goals) in two ways. First, it affirmatively sends messages about the benefits of democratic ideals and systems through the statements of its diplomats and through published policies and statements from the Department of State and the executive branch.<sup>41</sup> Second, it does so by publicly condemning actions of foreign nonstate actors and state actors alike when those regimes engage in actions that are oppressive and theocratic and, thus, not democratic or pluralistic in nature.<sup>42</sup>

The United States has a distinct approach to both foreign policy and national security given its unique history and its resulting cultural and political traditions. Colonial America's development was influenced by the Enlightenment; the young colonies embraced the Enlightenment's focus on individual liberty, rationality, and empiricism.<sup>43</sup> Moreover, the "vast distance between the newly independent United States and the great powers of Europe and Asia further contributed to

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<sup>36</sup> FOREIGN POLICY: THEORIES, ACTORS, CASES 2–3 (Steve Smith et al. eds., 2d ed. 2012).

<sup>37</sup> *Id.* at 2.

<sup>38</sup> *Id.* at 63.

<sup>39</sup> *Id.* at vii.

<sup>40</sup> President Harry Truman, Address to the NAACP (June 29, 1947), <https://www.trumanlibrary.org/publicpapers/index.php?pid=2115> [<https://perma.cc/GM99-D936>] ("The support of desperate populations of battle-ravaged countries must be won for the free way of life. We must have them as allies in our continuing struggle for the peaceful solution of the world's problems. Freedom is not an easy lesson to teach . . . to peoples beset by every kind of privation. They may surrender to the false security offered so temptingly by totalitarian regimes unless we can prove the superiority of democracy. Our case for democracy . . . should rest on practical evidence that we have been able to put our own house in order.").

<sup>41</sup> *See infra* Section III.D.

<sup>42</sup> *See infra* Section III.D.

<sup>43</sup> HOOK & SPANIER, *supra* note 24, at xiii.

a sense of national exceptionalism that has persisted throughout the nation's history.”<sup>44</sup>

That sense of national exceptionalism, which continues today, led the United States to develop a sense of duty to other nations, a duty that is explained by constructivist theories of foreign policy.<sup>45</sup> These theories examine how a nation's identity informs its interests and the role that international society plays in the formation of both identity and interests.<sup>46</sup> For the United States, its dual identity—as an exceptional nation and as a “city on a hill” [that] has an obligation to promote freedom abroad”<sup>47</sup>—leads to its longstanding commitment to promoting democracy outside of its borders.<sup>48</sup>

Moreover, the history of the American Revolution and the values on which it was fought have created a deeply embedded collective narrative that the United States is the greatest country on Earth, one that offers liberty, freedom, the rule of law, and opportunity for everyone who enters its borders. These beliefs and values, in turn, inform American foreign policy, which “evolved into a moral campaign aimed not simply at protecting the nation's interests but also at saving the self-destructive interstate system from itself.”<sup>49</sup> These two goals “were commonly regarded as inseparable: a more democratic world, it was assumed, would be more peaceful, and only in such a world would the United States be truly secure.”<sup>50</sup>

This collective belief was further strengthened when the Cold War ended and the Soviet Union dissolved, leaving the United States as the world's sole superpower.<sup>51</sup> It was during this era in U.S. history that national security “became more than protecting the Union and establishing international independence; it became a matter of moral superiority.”<sup>52</sup>

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<sup>44</sup> *Id.*

<sup>45</sup> See FOREIGN POLICY: THEORIES, ACTORS, CASES, *supra* note 36, at 228.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* (quoting EDWARD HALLETT CARR, *THE TWENTY YEARS' CRISIS, 1919–1939: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS* (1964)).

<sup>48</sup> *Id.*

<sup>49</sup> See HOOK & SPANIER, *supra* note 24, at xiii–xvi.

<sup>50</sup> *Id.*; see also *id.* at xiii (“[T]he United States has pursued its goals overseas with a distinctive national style that is deeply engrained in the nation's political and societal culture. Both the monumental achievements of the U.S. government and its many foreign policy setbacks can be attributed to the nation's constructed identity as an exceptional world power uniquely qualified not simply to dominate but to remake the world order in its own image.”).

<sup>51</sup> *Id.* at 4.

<sup>52</sup> Laura K. Donohue, *The Limits of National Security*, 48 AM. CRIM. L. REV. 1573, 1657 (2011).

Today, globalization has forced U.S. foreign policy to broaden beyond mere moral superiority.<sup>53</sup>

### B. *Interest Convergence*

The key concept that connects U.S. foreign policy and national security interests to the need for formal equality for LGBT Americans (through the passage and enforcement of antidiscrimination laws) is Bell's theory of interest convergence.

Bell coined that term to describe an analytical tool that he used to explain the United States Supreme Court's decision in *Brown v. Board of Education*.<sup>54</sup> He posited that the interest of African Americans and their racial justice allies "in achieving racial equality [was] . . . accommodated only when it converge[d] with the interests of whites."<sup>55</sup> Conversely, Bell contended that the Fourteenth Amendment, "standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites."<sup>56</sup> Thus, it was not the nature of the actual harm to African Americans that prompted the Court to hold that the Fourteenth Amendment prohibited legal classifications based on race, but rather the fact that formal racial equality would benefit whites.<sup>57</sup> Accordingly, Bell suggested that formal racial equality for marginalized groups resulted only when that equality was "among the interests deemed important by the courts and by society's policymakers."<sup>58</sup>

Interest convergence is, therefore, the device through which diverse self-interests of various political groups overlap in a manner that forms an issue-specific alliance that is capable of effecting significant policy change.<sup>59</sup>

As argued below, there is an interest convergence today between the foreign policy and national security communities (preserving American power abroad and ensuring national

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<sup>53</sup> See James M. Lindsay et al., *The Globalization of Politics: American Foreign Policy for a New Century*, COUNCIL ON FOREIGN RELATIONS (Winter 2003), <http://www.cfr.org/world/globalization-politics-american-foreign-policy-new-century/p6330> [<https://perma.cc/9LQ6-7FCD>].

<sup>54</sup> Bell, *supra* note 30, at 522.

<sup>55</sup> *Id.* at 523.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Sudha Setty, *National Security Interest Convergence*, 4 HARV. NAT'L SEC. J. 185, 187 (2012). The realist theory of legislative action predicts that "if minority groups are so politically powerless that majority groups can ignore their interests without suffering a political detriment, . . . [there will be] a lack of protection for minority groups beyond what is societally accepted as a bare minimum." *Id.* at 193 (footnote omitted).

security) and the interests of the American LGBT community (destroying conservative Christian supremacy and ensuring formal equality and dignity).<sup>60</sup> This article contends that the foreign policy and national security communities should recognize that they do, in fact, have an interest in social change, which, in turn, can inform their commitment to social and legal change for LGBT Americans.

## II. INTEREST CONVERGENCE OF FOREIGN POLICY, NATIONAL SECURITY, AND CIVIL RIGHTS: AN EXAMPLE FROM THE 1960S RACIAL JUSTICE STRUGGLE

### A. *The Political Backdrop to the American Racial Civil Rights Movement*

Having described both Bell's interest convergence theory and the basic principles of United States' foreign policy and national security, this section connects those. It illustrates—using the civil rights movement and the foreign policy and national security concerns present in that era of American history—how Bell's interest convergence theory can become operational to effect civil rights victories. In the *Brown* litigation and the Cold War, the interests of the foreign policy and national security communities (preserving American power abroad and ensuring national security) in civil rights converged with the interests of the African American community (destroying white supremacy and ensuring formal equality and dignity).

The connection between racial justice within America's own borders and its foreign policy and national security concerns first materialized in World War I. White troops from France, Germany, and Great Britain were killing each other; many people of color never imagined that whites would engage

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<sup>60</sup> See generally S. POVERTY LAW CTR., 'RELIGIOUS LIBERTY' AND THE ANTI-LGBT RIGHT: THE HARDLINE GROUPS PROMOTING 'RELIGIOUS FREEDOM RESTORATION ACTS' TO JUSTIFY ANTI-GAY DISCRIMINATION 4 (2016), [https://www.splcenter.org/sites/default/files/splc\\_religious\\_liberty\\_and\\_anti-lgbt\\_right.pdf](https://www.splcenter.org/sites/default/files/splc_religious_liberty_and_anti-lgbt_right.pdf) [<https://perma.cc/X9YB-QKVK>] ("The new RFRA's are being championed by extreme religious-right groups that—as these profiles reveal—want to reverse the recent progress toward equal protection under the law for the LGBT community. If they had their way, the country would return to the era when gay people remained in the closet and the government claimed the right to say what could go on between consenting adults in their bedrooms."); see also About, NAT'L LGBTQ TASK FORCE, <http://www.thetaskforce.org/about/mission-history.html> [<https://perma.cc/R99W-2WQK>] ("[M]illions of LGBTQ people face barriers in every aspect of their lives: in housing, employment, healthcare, retirement, and basic human rights. These barriers must go. That's why the Task Force is training and mobilizing millions of activists across our nation to deliver a world where you can be you.").



in white-on-white warfare.<sup>61</sup> Soldiers of color realized that white supremacy was neither unified nor impenetrable.<sup>62</sup>

Moreover, many African American soldiers fought alongside French troops; the respect with which French troops treated them was a novel experience.<sup>63</sup> U.S. military leadership, as well as President Wilson, feared that if these American soldiers of color were treated as equals by the French, it would cause them to push back against Jim Crow and white supremacy upon their return to the United States.<sup>64</sup> The leadership and the president were right: many soldiers of color returned from the war “less willing to be intimidated by white civilians.”<sup>65</sup> America emerged from WWI as a world power for the first time; its appearance on the world’s stage as a power “brought the country’s internal conflicts into the full daylight of the international arena.”<sup>66</sup>

World War II increased the anger and disillusionment of American soldiers of color and created more opportunities for other countries to label the United States as a hypocrite. The United States sent African American soldiers to fight against Hitler’s mission, which was a purely racial one: to ensure the victory and dominance of the Aryan race by whatever means necessary, including the mass killing of non-Aryans. When Hitler encountered international criticism, he simply turned to the narratives of those countries who criticized him by “having his ministers remind diplomats and the foreign press that Germany was hardly unique in this regard, pointing to the segregation and immigration laws of other predominantly white nations.”<sup>67</sup>

African American soldiers fought side-by-side with white soldiers from the United States and its allies, but after the war returned home to a country that was segregated—not unlike the situation they had just been sent to fight against.<sup>68</sup> These African American soldiers returned home hopeful that their experiences in the war—of fighting alongside white soldiers—would engender racial equality back in the United

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<sup>61</sup> See THOMAS BORSTELMANN, *THE COLD WAR AND THE COLOR LINE: AMERICAN RACE RELATIONS IN THE GLOBAL ARENA* 21–22 (2001).

<sup>62</sup> See *id.*

<sup>63</sup> *Id.* at 23–24.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 21–22. “By dividing the white nations and drawing in so many non-European combatants, [WWI] threatened the survival of global white rule.” *Id.* at 23.

<sup>66</sup> *Id.* at 25.

<sup>67</sup> *Id.* at 27–28.

<sup>68</sup> *Id.* at 24, 28.

States; that hope was quickly quashed.<sup>69</sup> As one returning African American soldier recalled:

They told us to “go catch the Kaiser and everything’ll be all right.” We went over there and fought and first thing I heard when I got back to Waco, Texas, was a white man telling me to move out of the train station. He said, “Nigger, you ain’t in France no more, you’re in America.” He didn’t even give me time to take off the uniform.<sup>70</sup>

This disconnect between the message the United States was sending to the international community and its own racial practice at home made the United States vulnerable to accusations of hypocrisy.<sup>71</sup> The German and Japanese military leaders used American segregation and discrimination to their advantage, both during and after World War II.<sup>72</sup> While America emerged from World War II as a superpower, its Jim Crow society “caused uncertainty among other peoples who admired much else about the new North American superpower.”<sup>73</sup>

As the Cold War began, the United States lacked legitimacy on the world stage; it purported to be the voice of justice and freedom, in juxtaposition to the communist threat of the Soviet Union, while simultaneously subjecting black Americans to the legal, social, and physical violence of Jim Crow.<sup>74</sup>

President Truman recognized the foreign policy and national security implications of the United States’ hypocrisy on civil rights. In 1947, Truman’s President’s Committee on Civil Rights issued a report emphasizing the foreign relations implications of Jim Crow at home, calling it a “serious obstacle” to the United States’ ability to be a world leader.<sup>75</sup> His Department of Justice intervened in litigation and urged courts to side with racial justice advocates on issues such as the white primary,<sup>76</sup> racially restrictive covenants,<sup>77</sup> and school segregation;<sup>78</sup> in all of these cases the administration urged the Supreme Court to appreciate the “negative impact of officially sanctioned racial discrimination on American foreign relations.”<sup>79</sup> Several years

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<sup>69</sup> *Id.* at 24.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 29 (“By framing their war propaganda as a struggle for democracy and against the Third Reich’s racist tyranny, the Western Allies opened themselves to intensive critiques of their own colonial and segregationist practices.”).

<sup>72</sup> *Id.* at 36.

<sup>73</sup> *Id.* at 45.

<sup>74</sup> *Id.* at 45–47.

<sup>75</sup> *Id.* at 59.

<sup>76</sup> *See* *Smith v. Allwright*, 321 U.S. 649, 650–53 (1944).

<sup>77</sup> *See* *Shelley v. Kraemer*, 334 U.S. 1, 4 (1948).

<sup>78</sup> *See* *Brown v. Bd. of Educ.*, 347 U.S. 483, 485 (1954).

<sup>79</sup> BORSTELMANN, *supra* note 61, at 57.

later, Truman recognized that if the Court upheld school segregation in *Brown*, “the American position in a mostly nonwhite world would be devastated—and the United States revealed for the hypocrite its critics accused it of being.”<sup>80</sup>

President Eisenhower took over the presidency during a critical time in the Cold War, a time when the United States and the Soviet Union were both trying to woo newly independent African nations as allies.<sup>81</sup> “The prejudice and humiliation experienced by nonwhite [diplomats and leaders from other countries] to the nation’s capital—unable to use public facilities like restaurants, theaters, and hotels—seemed to trumpet to the world American hypocrisy about freedom.”<sup>82</sup> To blunt this perception, Eisenhower used his federal authority to eliminate racial barriers in public accommodations in the District of Columbia between 1953 and 1955; in 1955, he integrated the United States military.<sup>83</sup>

Thus, in World War II and the Cold War, the United States was the global leader in the fight against fascism, Nazism, and communism. To have legitimacy as a global leader, the United States needed to reject those ideologies and practices within its boundaries, however. America’s national security interests were also at stake: “International perception mattered. . . . Failure to address racial disparity would fuel Soviet criticism of the West, giving the U.S.S.R. ammunition to mount its psychological campaign.”<sup>84</sup> For example, the Soviet government took every opportunity to point out the hypocrisy inherent in the United States’ foreign policy positions and its behavior within the borders of the United States.<sup>85</sup> The Jim Crow system in the United States provided the Soviet government the “irresistible opportunity” to respond to the U.S. government’s outcry about the repression of individual rights of those living in the Soviet bloc by pointing out the hypocrisy of the U.S. position:

When Secretary of State Byrnes tried to protest the Soviet denial of voting rights in the Balkans in 1946, he was stumped by the Soviet retort that “the Negroes of Mr. Byrnes’ own state of South Carolina” were “denied the same right”—“a checkmate of the first order,” admitted a U.S. psychological warfare official.<sup>86</sup>

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<sup>80</sup> *Id.* at 57–58.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 91.

<sup>83</sup> *Id.*

<sup>84</sup> Donohue, *supra* note 52, at 1696 (footnote omitted).

<sup>85</sup> BORSTELMANN, *supra* note 61, at 75.

<sup>86</sup> *Id.*

Additionally, failure to explicitly reject fascism, Nazism, and communism “would undermine the United States’ role within the western bloc, bringing disrepute on the very ideas that the West claimed as its foundation. The extent to which the United States appeared hypocritical would diminish American authority and perceptions of veracity across the board.”<sup>87</sup>

This amalgamation of events in the United States and abroad set up the perfect conditions for an interest convergence between the racial civil rights movement and the United States’ foreign policy and national security communities.

### B. *Brown and Interest Convergence Theory*

Before *Brown*, the Court had upheld the legality of “separate but equal,” a precedent that had governed since *Plessy v. Ferguson* was decided in 1896.<sup>88</sup> What might explain the Court’s sea-change after nearly six decades? Professor Bell argues that interest convergence explained the Court’s shift in *Brown* away from “separate but equal” and toward legally mandated desegregation.<sup>89</sup> Both the NAACP and the federal government took the position in the *Brown* litigation that a desegregation order from the Court was needed to “provide immediate credibility to America’s struggle with Communist countries to win the hearts and minds of emerging third world peoples.”<sup>90</sup>

Bell further evaluated the *Brown* decision as one that was based on an intersection of the interests of civil rights activists and the interests of the mostly white national security and foreign policy communities.<sup>91</sup> Namely, it was the “decision’s value to . . . those whites in policymaking positions able to see the economic and political advances at home and abroad that would follow abandonment of segregation” that collided with blacks’ interests in desegregation and made the *Brown* decision possible.<sup>92</sup> Thus, the *Brown* decision only became possible when powerful white decision makers within the U.S. national security and foreign policy communities decided that they had an interest in school desegregation; the interests of African

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<sup>87</sup> Donohue, *supra* note 52, at 1696 (footnote omitted).

<sup>88</sup> *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896); *see also* Bell, *supra* note 30, at 523–24 (“[P]rior to *Brown*, black claims that segregated public schools were inferior had been met by orders requiring merely that facilities be made equal. What accounted, then, for the sudden shift in 1954 away from the separate but equal doctrine and towards a commitment to desegregation?” (footnote omitted)).

<sup>89</sup> Bell, *supra* note 30, at 524.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

American racial justice advocates standing alone would not have been sufficient to support the outcome in *Brown*.<sup>93</sup>

The interest of the powerful, white, foreign policy decision makers in ending Jim Crow era laws, including school segregation, is laid out above. In sum, that interest was founded on the recognition that the United States, which had fought two world wars to spread freedom and equality abroad and was about to begin its decades-long Cold War that pitted Communism against the American ideals of liberty and freedom, appeared hypocritical.<sup>94</sup> The persistence of racially discriminatory policies in the United States so smacked of hypocrisy that it effectively undermined the legitimacy of American foreign policy while simultaneously creating a national security risk by providing rich fodder for the Soviet Union's Communist recruitment efforts.<sup>95</sup>

It was this interest convergence that led the United States to take affirmative steps to support racial equality in America. The United States—through the president and the agencies of the executive branch—affirmatively encouraged courts and legislatures to accept its understanding of the connection between racial civil rights and United States' foreign policy and national security interests. Specifically, the Truman administration “impressed upon the Supreme Court the necessity for world peace and national security of upholding black civil rights at home.”<sup>96</sup> To that end, the U.S. Department of Justice filed an amicus brief in *Brown v. Board of Education* arguing that “desegregation was in the national interest in part due to foreign policy concerns.”<sup>97</sup> The United States Supreme Court declared school segregation to be unlawful in *Brown v. Board of Education* in 1954.<sup>98</sup> Later, President Johnson used the international outcry, and attendant national embarrassment, in response to some southern states resisting the Court's desegregation order in *Brown* to push the Civil Rights Act of 1964 through Congress.<sup>99</sup>

Thus, the victories of the civil rights movement of the 1950s and 1960s are examples of Bell's interest convergence theory at work. These triumphs were the direct result of the

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<sup>93</sup> *Id.* at 523–25.

<sup>94</sup> BORSTELMANN, *supra* note 61, at 57–58.

<sup>95</sup> *Id.*

<sup>96</sup> Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 64 (1988).

<sup>97</sup> *Id.* at 65.

<sup>98</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

<sup>99</sup> Jack M. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1554 (2004).

efforts of two affected communities—the racial justice movement (which had morality and rights-based interests) and the foreign policy and nation security community (which had political and power-based interests).

### III. MOVING TARGETS AND SHIFTING NARRATIVES: THE CURRENT LEGAL LANDSCAPE OF ANTIDISCRIMINATION AND RELIGIOUS FREEDOM LAWS

#### A. *Antidiscrimination Laws*

##### 1. The Shifting Narrative of the Religious Right

Before describing the current landscape of antidiscrimination and religious freedom laws, an account of the changing narrative of the Religious Right is necessary to provide a historical context for the faction's more recent attempts to seek religious exemptions from general laws of neutral applicability. Moreover, this narrative provides vital support for the assertion that the current wave of state Religious Freedom Restoration Acts (RFRAs) and other religious exemption laws are, at best, anti-Establishment and, at worst, quasi-theocratic; these characteristics of the laws, in turn, inform this article's interest convergence argument.

The shift in the legal and cultural debate about LGBT people over the past sixty years is partly due to a dramatic change in the narrative employed by the Religious Right in its anti-LGBT crusade.<sup>100</sup> That narrative has shifted to one that is squarely aimed at creating theocratic-like zones of exemption that favor the Religious Right's beliefs over all others; it is the anti-Establishment and antipluralistic goals of the Religious Right that create the interest convergence between LGBT civil rights activists and U.S. foreign policy and national security interests.<sup>101</sup>

From the 1950s through the 1980s, the Religious Right consistently crafted a rhetoric that calumniated "homosexuals"<sup>102</sup>

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<sup>100</sup> DIDI HERMAN, *THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT* 28–59 (1997).

<sup>101</sup> See *infra* Part V.

<sup>102</sup> The term "homosexual" was (and is) most often used by anti-LGBT individuals to pathologize and demonize LGBT people. As a result, most members of the LGBT community prefer the term "same-sex" or "LGBT." See generally *GLAAD Media Reference Guide—Terms to Avoid*, GLAAD, <http://www.glaad.org/reference/offensive> [<https://perma.cc/F4DV-HBLS>] ("Please use gay or lesbian to describe people attracted to members of the same sex. Because of the clinical history of the word 'homosexual,' it is aggressively used by anti-gay extremists to suggest that gay people are somehow diseased or psychologically/emotionally disordered—notions discredited by

as diseased, as pedophiles, and as child molesters.<sup>103</sup> The Religious Right expressed its dismay with LGBT people bluntly: “[H]omosexuality is contrary to nature, and . . . it is part of the degeneration of man that guarantees ultimate disaster in the life and the life to come. . . . The Church had better make it plain that Christianity and homosexuality are incompatible.”<sup>104</sup>

In many instances, public sentiment aligned with the Religious Right’s disparaging rhetoric. For example, in the late 1950s, Congress issued a report titled “Employment of Homosexuals and Other Sex Perverts in Government”<sup>105</sup> in response to what was known as the “Lavender Scare”—a purging of 5000 government workers from federal employment.<sup>106</sup> The report described LGBT people as ones who “engage in overt acts of perversion [and] lack the emotional stability of normal persons.”<sup>107</sup> In 1952, the American Psychiatric Association included homosexuality as a “sociopathic personality disturbance” in its first publication of the *Diagnostic and Statistical Manual of Mental Disorders*<sup>108</sup>—which remained there until 1973.<sup>109</sup> In 1953, President Eisenhower issued an executive order banning LGBT people from federal employment, as well as from employment with any private contractor working for the federal government; he reasoned that homosexuals were “security risks,” along with alcoholics and neurotics.<sup>110</sup>

By the late 1960s, the LGBT-rights movement began to gain momentum. The birth of the modern-day LGBT-rights movement is widely recognized to have occurred at the 1969 riots at the Stonewall Inn, a gay bar in New York City that had

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the American Psychological Association and the American Psychiatric Association in the 1970s.”).

<sup>103</sup> HERMAN, *supra* note 100, at 47–48, 76–78.

<sup>104</sup> *Id.* at 47 (second omission in original).

<sup>105</sup> See “*Employment of Homosexuals and Other Sex Perverts in Government*” (1950), FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/assault/context/employment.html> [https://perma.cc/Z8HG-6ACT].

<sup>106</sup> See Susan Donaldson James, *Lavender Scare: U.S. Fired 5,000 Gays in 1953 ‘Witch Hunt’*, ABC NEWS (Mar. 5, 2012), <http://abcnews.go.com/Health/lavender-scare-us-fired-thousands-gays-infamous-chapter/story?id=15848947> [https://perma.cc/HHK3-5RAJ].

<sup>107</sup> See “*Employment of Homosexuals and Other Sex Perverts in Government*” (1950), *supra* note 105.

<sup>108</sup> See AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL: MENTAL DISORDERS* 38–39 (1952), <http://www.turkpsikiyatri.org/arsiv/dsm-1952.pdf> [https://perma.cc/PAM3-T22J].

<sup>109</sup> See also *Panelists Recount Events Leading to Deleting Homosexuality as a Psychiatric Disorder from DSM*, PSYCHIATRIC NEWS, <http://www.psychiatricnews.org/pnews/98-07-17/dsm.html> [https://perma.cc/FG4Y-R4X2].

<sup>110</sup> See *A History of Gay Rights in America*, CBS NEWS, <http://www.cbsnews.com/pictures/a-history-of-gay-rights-in-america/6/> [https://perma.cc/6KJC-VTBD]; Donaldson James, *supra* note 106.

regularly been targeted by police since its opening in 1967.<sup>111</sup> The police, believing that the mostly gay patrons of the Stonewall Inn were “sexual deviants,”<sup>112</sup> conducted raids of the Inn that were marked by shocking police brutality and mass arrests of LGBT people.<sup>113</sup> On June 28, 1969, the patrons decided to fight back when the police conducted a raid.<sup>114</sup> Three days of rioting ensued, and the “gay rights” movement was born.<sup>115</sup>

As LGBT civil rights activists found their voice in the public discourse and began their social and legal campaigns for equality, the backlash from the Religious Right quickly emerged. The Religious Right’s anti-LGBT agenda is rooted in its members’ understanding of Christianity and the teachings of the Bible; they believe that homosexuality is a sin against God, so that granting civil rights to LGBT people would be akin to granting civil rights to adulterers and murderers.<sup>116</sup> For these Christian conservatives, there was a dichotomous choice to be made—a choice between giving LGBT civil rights and being faithful to the word of God. “The increasing acceptance of homosexuality . . . became a sign of godlessness and impending calamity. The opposition of the orthodox, then, became the primary obstacle to the progress of gay rights.”<sup>117</sup>

Throughout the 1960s, the Religious Right accused the LGBT movement of attempting to infiltrate schools (as teachers) to sexually molest schoolchildren or force their lifestyle on schoolchildren.<sup>118</sup> Further, during this era, the Religious Right showed a “growing concern with ‘gay militancy,’ and an increase in the linking of homosexuality to sexual crime.”<sup>119</sup>

The Religious Right emerged as a political and cultural organizing force in the 1970s and emerged in the face of the strengthening LGBT civil rights movement.<sup>120</sup> By the end of the 1970s, the LGBT rights movement was portrayed as “an anti-Christian force, promoting a heresy increasingly sanctioned by

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<sup>111</sup> See *This Day in History: 1969 The Stonewall Riot*, HISTORY.COM, <http://www.history.com/this-day-in-history/the-stonewall-riot> [<https://perma.cc/US68-9TWL>].

<sup>112</sup> See Jasmine Foo, Note, “*In Sickness and in Health, Until Death Do Us Part*”: An Examination of FMLA Rights for Same-Sex Spouses and a Case Note on *Obergefell v. Hodges*, 36 J. NAT’L ASS’N ADMIN. L. JUDGES 638, 642 (2016).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> HERMAN, *supra* note 100, at 3.

<sup>117</sup> *Id.* at 4.

<sup>118</sup> *Id.* at 48 (“Homosexuals . . . will be tempted to join the teaching ranks in an attempt to gain either an outlet for their sexual drives or a platform from which to propagandize for public acceptance of their irregularities.”).

<sup>119</sup> *Id.* at 50.

<sup>120</sup> See *id.*



the state in the form of decriminalization [of sodomy] and the extension of civil rights.”<sup>121</sup>

With regard to individual voices in the Religious Right, Anita Bryant is one example from this era. In the 1970s, Anita Bryant, a nationally known singer, a spokesperson for Florida and Florida orange juice, and a prominent Baptist,<sup>122</sup> led the “Save our Children” campaign to repeal a Dade County, Florida, ordinance preventing discrimination based on sexual orientation.<sup>123</sup> Bryant used hateful anti-LGBT rhetoric in her campaign. She said: “As a mother, I know that homosexuals cannot biologically reproduce children, therefore, they must recruit our children” and “[i]f gays are granted rights, next we’ll have to give rights to prostitutes and to people who sleep with Saint Bernards and to nail biters.”<sup>124</sup> A full-page newspaper advertisement was taken out by Save Our Children, warning that the “OTHER SIDE OF THE HOMOSEXUAL COIN IS A HAIR-RAISING PATTERN OF RECRUITMENT AND OUTRIGHT SEDUCTION AND MOLESTATION.”<sup>125</sup> Save Our Children’s anti-LGBT victory had a ripple effect. The day after the Dade County vote, Florida’s governor signed into law a ban on adoption by gay men and lesbians, which was the first statewide adoption prohibition in the United States.<sup>126</sup> In 1978, conservative Christian Tim LeHay authored the book *Unhappy Gays* to warn others within the Religious Right of his belief that the “homosexual community, by militance and secret political maneuvering, is designing a program to increase the tidal wave of homosexuality that will drown our children in a polluted sea of sexual perversion.”<sup>127</sup>

In the 1980s, then-Congressman William Dannemeyer wrote a book titled *Shadow in the Land: Homosexuality in America*, in which he described LGBT people as “the ultimate enemy” and described the LGBT civil rights movement as a “blitzkrieg” that was “better planned and better executed than

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<sup>121</sup> *Id.*

<sup>122</sup> See Robert Medley, *Anita Bryant: Sunny Side of Life*, NEWSOK, <http://ndepth.newsok.com/anita-bryant> [<https://perma.cc/R5W4-KBN7>].

<sup>123</sup> See *Anita Bryant and the Save Our Children Campaign*, GAY HISTORY (Aug. 13, 2009), <http://gayhistory4u.blogspot.com/2009/08/religious-right-has-been-on-attack.html> [<https://perma.cc/UGC9-7B68>].

<sup>124</sup> *Id.*

<sup>125</sup> DUDLEY CLENDINEN & ADAM NAGOURNEY, *OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA* 291–99, 303–04 (1999).

<sup>126</sup> See FLA. STAT. ANN. § 63.042 (West 2001). This adoption ban was in effect until 2010. See *Fla. Dep’t of Children & Families v. Adoption of X.X.G.*, 45 So. 3d 79, 81 (Fla. Dist. Ct. App. 2010).

<sup>127</sup> HERMAN, *supra* note 100, at 62.

Hitler's."<sup>128</sup> Moreover, characterizing gay men as diseased and dirty was a consistent theme of the Religious Right throughout the 1980s and 1990s: "Gay sexual practices, according to the [Religious Right] not only led to the acquisition of devastating illness—AIDS . . . —but [they] are filthy, disgusting, and unnatural at their core."<sup>129</sup> During the AIDS crisis in the 1980s, commentators from the Religious Right often used AIDS in their antigay rhetoric. For example, in 1983, Patrick Buchanan, former Republican presidential candidate, wrote: "The poor homosexuals. They have declared war on nature, and now nature is exacting an awful retribution."<sup>130</sup> In 1990, he wrote: "With 80,000 dead of AIDS, our promiscuous homosexuals appear literally hell-bent on Satanism and suicide."<sup>131</sup>

The 1990s saw an uptick in outwardly anti-LGBT rhetoric. The Religious Right framed the social changes occurring during that time as a war against "political correctness" and as a "culture war."<sup>132</sup> At the center of this culture war was the gay rights movement.<sup>133</sup> In 1993, Buchanan wrote: "Gay rights activists seek to substitute, for laws rooted in Judeo-Christian morality, laws rooted in the secular humanist belief that all consensual sexual acts are morally equal. That belief is anti-biblical and amoral; to codify it into law is to codify a lie."<sup>134</sup>

By the 1990s, the Religious Right was the premiere model of how a coalition may achieve effective social change.<sup>135</sup> It achieved this influential status by creating a cottage industry of publicly available materials<sup>136</sup> and by coordinating efforts to defeat the LGBT civil rights movement.<sup>137</sup> The Religious Right worked hard to create an image of the LGBT civil rights movement as one that was powerful, one with an agenda that included the "recruitment" of children, and one

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<sup>128</sup> *Id.* at 63–64.

<sup>129</sup> *Id.* at 76.

<sup>130</sup> See *Pat Buchanan's Greatest Hits*, WASH. POST (Feb. 4, 1987), <https://www.washingtonpost.com/archive/politics/1987/02/04/pat-buchanans-greatest-hits/416e2224-f7cd-4271-8c9d-0712712df6f3/> [<https://perma.cc/6TCM-4H32>].

<sup>131</sup> *Pat Buchanan in His Own Words*, FAIR (Feb. 26, 1996), <http://fair.org/press-release/pat-buchanan-in-his-own-words/> [<https://perma.cc/3T7H-YXBK>].

<sup>132</sup> HERMAN, *supra* note 100, at 55.

<sup>133</sup> *Id.*

<sup>134</sup> *Pat Buchanan in His Own Words*, *supra* note 131.

<sup>135</sup> See HERMAN, *supra* note 100, at 4.

<sup>136</sup> The Religious Right of the 1990s has been described as a new "cultural genre, consisting of books, videos, and special reports, specifically dedicated to identifying the gay threat, and calling Christian believers to arms." *Id.* at 61. They also produced two anti-LGBT videos, which churches and cable television frequently replayed. *Id.* at 80–82.

<sup>137</sup> *Id.* at 4–5.

that the Religious Right should fear.<sup>138</sup> In sum, by the 1990s, the anti-LGBT narrative of the Religious Right included “two key discourses . . . biblical injunction and a rhetoric of disease and seduction.”<sup>139</sup>

The Religious Right’s vilifying and dehumanizing social narrative about LGBT people informed the character of its legal fights against LGBT civil rights. It utilized blatantly homophobic and antigay rhetoric based on LGBT people as *LGBT people*, meaning that the Religious Right built its anti-LGBT civil rights agenda and movement on the perceived personal qualities, characteristics, and conduct of the LGBT people it was demonizing. By framing its cultural and legal argument as about LGBT people and the moral and religious failure of LGBT people, the Religious Right’s anti-LGBT civil rights movement of the 1970s through 1990s shined its light outward—to the LGBT community—rather than inward, on itself and its members. Put another way, in the 1970s through the 2000s, the Religious Right operated as an outwardly bigoted movement; it was able to advance its agenda by attacking LGBT people. The narrative was employed to create affirmatively anti-LGBT laws—including bans on LGBT teachers in public schools in Oklahoma and Arkansas—and to roll back civil rights protections for LGBT people, as seen in the repeal of the Dade County antidiscrimination ordinance.<sup>140</sup> Alarming, that narrative found support in constitutional law.<sup>141</sup>

The Religious Right’s demonizing and dehumanizing narrative shifted dramatically in the 1990s and into the 2000s as more people came out as gay, lesbian, bisexual, or transgender and as the LGBT community experienced legislative and judicial victories as well as more widespread social acceptance.<sup>142</sup> A leading

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<sup>138</sup> *Id.* at 82–85 (“Children are the prize to the winners of the second great civil war. Those who control what young people are taught and what they experience—what they see, hear, think, and believe—will determine the future course of the nation.”); *see also* Brief of Amici Curiae Historians of Antigay Discrimination in Support of Plaintiffs-Appellees at 18, *Tanco v. Haslam*, No. 14-5297 (6th Cir. June 16, 2014), <http://www.nclrights.org/wp-content/uploads/2014/06/2014.06.16-Dkt-67.-Historians-of-Discrim-Amicus.pdf> [<https://perma.cc/4DTY-UABE>] (noting that anti-LGBT activists “frequently fomented public fear of gay people by deploying vicious stereotypes of homosexuals as perverts threatening the nation’s children and moral character”).

<sup>139</sup> HERMAN, *supra* note 100, at 113.

<sup>140</sup> *See, e.g.*, Daniel C. Sanpietro, Note, “*Gradually Triumphant over Ignorance*”: *Rhode Island’s Treatment of Sexual Orientation Discrimination in the Workplace*, 30 SUFFOLK U. L. REV. 439, 460, 440 n.5 (1997).

<sup>141</sup> *See, e.g.*, *Bowers v. Hardwick*, 478 U.S. 186, 191, 194 (1986) (upholding Georgia’s criminal ban on sodomy), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>142</sup> Legislative victories began when states began to amend their antidiscrimination statutes to include sexual orientation, and in some instances, gender identity, as a protected characteristic. For example, in 1982, Wisconsin became the first state to ban both public and private sector employment discrimination based on sexual

voice in the Religious Right for this rhetorical shift was Tony Marco, who in the mid-1990s published pieces calling on the Religious Right to abandon its vilifying narrative;<sup>143</sup> he believed that this narrative was irrelevant to the issues being raised by the LGBT civil rights movement, that they were “no longer credible,” and they appealed “only to the ‘choir’ and actually allow[ed their] opponents to once again tar [them] with the role of aggressors—and clumsy, lying ones at that.”<sup>144</sup> There were hazards in the old rhetoric that were becoming more obvious to the Religious Right as the LGBT community began to win civil rights—that narrative sounded “extremist and hateful to less orthodox public”<sup>145</sup> and thus it would not carry the day in the *legal* battle over LGBT civil rights. Reference to religious texts would not be persuasive in a court bound by the rule of (civil) law and the narrative of homosexuality as synonymous with pedophilia and mental depravity had long ago been debunked by science.<sup>146</sup> Thus, the anti-LGBT narrative of the 2000s turned to one in which the Religious Right argued that LGBT people did not deserve civil rights protections, which it deemed “special rights.”<sup>147</sup>

This shift to whether LGBT Americans were “deserving” of “special rights” thus moved the Religious Right’s rhetoric from one that directly attacked LGBT people *as people* to one that did not directly touch on the essential attributes of LGBT people but rather to a political “rights” discussion. In other words, the Religious Right argued that the United States

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orientation. See 1981 Wis. Sess. Laws 901–08; see also William B. Turner, *The Gay Rights State: Wisconsin’s Pioneering Legislation to Prohibit Discrimination Based on Sexual Orientation*, 22 WIS. WOMEN’S L.J. 91, 93 (2007). The judicial victories began in 1996, when the Supreme Court decided *Romer v. Evans*, in which it struck down an amendment to the Colorado Constitution that prohibited the passage of any statutes or ordinances that included sexual orientation or gender identity as a protected characteristic. *Romer v. Evans*, 517 U.S. 620, 635–36 (1996). In 2003, the Supreme Court struck down Texas’s sodomy law as unconstitutional. *Lawrence v. Texas*, 539 U.S. 588 (2003). In 2013, the Court struck down the provision in the Defense of Marriage Act that prohibited the federal government from recognizing same-sex marriages from states that had legalized such marriages, and in 2015, the Court held that the fundamental right to marry includes same-sex couples. See *United States v. Windsor*, 133 S. Ct. 2675, 2694–96 (2013); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

<sup>143</sup> HERMAN, *supra* note 100, at 113–15.

<sup>144</sup> *Id.* Marco was part of a growing number of “rights pragmatists” within the Religious Right who believed that the Religious Right needed to restructure its approach and agenda to defeat the LGBT civil rights movement. *Id.*

<sup>145</sup> *Id.* at 115.

<sup>146</sup> *Id.* (“[T]he rights pragmatists argued that the [Religious Right] had no choice but to fight the gay movement on liberal democratic turf; this necessitated acquiring an arsenal of secular discursive strategies aimed at undermining the legitimacy of lesbians and gay men as a rights-deserving group.”).

<sup>147</sup> See *id.*; see also *Romer*, 517 U.S. at 638 (Scalia, J., dissenting) (“The amendment prohibits *special treatment* of homosexuals, and nothing more.”).

should reject civil rights protections for LGBT people because, as a class, LGBT people did not need such protections, rather than arguing that such civil rights should be denied because LGBT people are diseased, immoral, and child predators.<sup>148</sup>

Finally, moving to our current moment, the tables have largely turned. The days of attacking the “other”—of denigrating and maligning gays, lesbians, bisexuals, and transgender people based simply on their sexual orientation or gender identity—have largely vanished. What was once an outwardly attacking anti-LGBT narrative has become an inwardly protective one and is couched in the narrative of “religious liberty.” The Religious Right has gone from attacker to victim in the national dialogue about LGBT equality. It has reframed the LGBT civil rights debate as one that involves a mutually exclusive contest between two rights-seeking groups: The Religious Right’s asserted absolute right to “religious freedom” pitted against the LGBT community’s asserted right to be free from SOGI discrimination in all walks of civil life.<sup>149</sup>

As seen below,<sup>150</sup> the current-day Religious Right has taken its rights-based rhetoric to a new level in its litigation and legislative efforts to roll back LGBT civil rights. This newest iteration of the Religious Right’s *legal* strategy to stop and reverse LGBT civil rights further explains its shift in *narrative* and vice versa. Rather than stopping or reversing LGBT civil rights gains through attacking LGBT people, this new strategy instead “seeks to shrink the public sphere and the arenas within which the government has legitimacy to defend people’s rights, including . . . LGBTQ rights.”<sup>151</sup> The central tactic in this legal strategy is to redefine our shared definition of “religious freedom”—a foundational concept in our constitutional democracy—into something akin to a conservative Christian quasi-theocracy that would be unrecognizable to this country’s founders.<sup>152</sup>

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<sup>148</sup> See generally HERMAN, *supra* note 100, at 128–32.

<sup>149</sup> See generally TIMOTHY WANG ET AL., THE FENWAY INST., THE CURRENT WAVE OF ANTI-LGBT LEGISLATION: HISTORICAL CONTEXT AND IMPLICATIONS FOR LGBT HEALTH (2016), <http://fenwayhealth.org/wp-content/uploads/The-Fenway-Institute-Religious-Exemption-Brief-June-2016.pdf> [<https://perma.cc/BWJ8-RAFF>] (“Religious exemption bills that target LGBT people’s ability to access health care are only part of a new wave of anti-LGBT legislation. . . . [M]ore and more anti-LGBT bills are introduced. . . . As of February 2016, more than 175 anti-LGBT bills had been filed in 32 states. . . . In addition to discriminatory religious exemption legislation, other anti-LGBT bills, such as bills that nullify local nondiscrimination ordinances inclusive of sexual orientation and gender identity, are being introduced in state legislatures across the country.” (footnotes omitted)).

<sup>150</sup> See *infra* Section II.B.3.

<sup>151</sup> CLARKSON, *supra* note 15, at 1.

<sup>152</sup> *Id.*

The Religious Right's project of redefining religious freedom in America began in 2009. In November 2009, 150 leaders of the Religious Right signed the *Manhattan Declaration: A Call to Christian Conscience*.<sup>153</sup> This declaration is a “manifesto linking three interrelated themes of ‘freedom of religion,’ ‘sanctity of life,’ and ‘dignity of marriage.’”<sup>154</sup> Since 2009, over 150 American religious have signed it,<sup>155</sup> and the declaration has received 551,130 individual signatures on its website as of July 18, 2015.<sup>156</sup>

The Declaration has been described as the “culmination of decades of theological and political development” during which “conservative Roman Catholic and evangelical strategists (joined by junior partners in the Mormon Church and Orthodox Christianity) found sufficient common theological and political ground to . . . envision a 21st century notion of Christian cultural conservatism—and a way to get there.”<sup>157</sup> The Declaration thus “crystallized a strategic direction deploying ‘religious freedom’ to roll back advances in LGBTQ rights and reproductive justice.”<sup>158</sup>

The Declaration illustrates its signatories’ commitment to redefining religious freedom as “being only for people who believe as they do, and as under attack by those who believe differently”<sup>159</sup>—a definition that is anti-Establishment and thus quasi-theocratic.

These are the key tenets of the Religious Right’s strategy to reformulate religious freedom, and they provide the structure for the rationale of the Religious Right’s efforts to convince courts and legislatures that for-profit corporations are exempt from compliance with state antidiscrimination laws, either through state RFRAs or the First Amendment.<sup>160</sup> These tenets also form the basis of the new anti-LGBT laws passed in 2016, most notably in North Carolina and Mississippi.<sup>161</sup>

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<sup>153</sup> *Id.* at 4.

<sup>154</sup> *Id.*

<sup>155</sup> MANHATTAN DECLARATION, LIST OF RELIGIOUS & ORGANIZATIONAL LEADERS SIGNATORIES, [http://manhattandeclaration.org/man\\_dec\\_resources/list\\_of\\_religious\\_leaders.pdf](http://manhattandeclaration.org/man_dec_resources/list_of_religious_leaders.pdf) [https://perma.cc/BYC9-9H9G]; see also *Christian Leaders Issue ‘Call of Conscience’*, ASSOCIATED PRESS (Nov. 20, 2009), <http://www.timesfreepress.com/news/local/story/2009/nov/20/christian-leaders-issue-call-conscience/243567/> [https://perma.cc/K46Z-R2X8].

<sup>156</sup> See *Manhattan Declaration: A Call of Christian Conscience*, REVOLVY, <https://www.revolvvy.com/main/index.php?s=Manhattan%20Declaration:%20A%20Call%20of%20Christian%20Conscience> [https://perma.cc/93EL-DMBE].

<sup>157</sup> CLARKSON, *supra* note 15, at 4.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 4–5.

<sup>160</sup> *Id.* at 5.

<sup>161</sup> See, e.g., *Barber v. Bryant*, 193 F. Supp. 3d 677, 690–91 (S.D. Miss. 2016).

The Religious Right's revisionist definition of religious freedom disregards the essential idea of that concept—"that religious liberty is only possible in the context of religious pluralism."<sup>162</sup> The end-game of the Religious Right's campaign to redefine religious freedom is to carve out various zones of exemptions from laws on religious grounds "so they do not have to follow the same rules as the rest of society."<sup>163</sup> "These overlapping exemptions threaten to give rise to theocratic zones of control violating the religious liberty of those who find themselves under their sway."<sup>164</sup> What the Religious Right is attempting to achieve through its campaign for religious exemptions is an anti-Establishment regime shrouded in the cloak of religious freedom.<sup>165</sup>

By characterizing its members as victims in need of protection, the Religious Right's new rhetoric achieves at least two strategic advantages. First, it can engage in the national dialogue about LGBT civil rights in courtrooms, the media, and in state and federal legislatures with a legitimacy that would be lacking if its rhetoric was still outwardly demonizing of LGBT peoples. Second, the Religious Right's new narrative permits it to obfuscate its actual ambition of achieving an anti-Establishment regime that codifies its conservative Christian beliefs over all other religious beliefs, and over the rule of law.<sup>166</sup>

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<sup>162</sup> CLARKSON, *supra* note 15, at 13.

<sup>163</sup> *Id.* at 14.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 16. While the term "religious freedom" can have different meanings in different contexts and to different people, it is used very deliberately by the Religious Right as a way to sterilize, neutralize, and conceal the actual, anti-Establishment goal of the Religious Right.

<sup>166</sup> See, e.g., *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 279 (Colo. App. 2015) ("Masterpiece asserts that its refusal to create the cake was 'because of its opposition to same-sex marriage, not because of its opposition to their sexual orientation.'"); *In re Klein*, 2015 WL 4868796, at \*19 (Or. Bureau of Labor & Indus. July 2, 2015) ("Respondents claim they are not denying service because of Complainants' sexual orientation but rather because they do not wish to participate in their same sex wedding ceremony."); *Elane Photography, LLC v. Willcock*, 309 P.3d 53, 61 (N.M. 2013) ("Elane Photography reasons that it did not discriminate 'because of . . . sexual orientation,' . . . but because it did not wish to endorse Willcock's and Collinsworth's wedding." (first alteration in original) (internal citation omitted)). The Supreme Court has soundly rejected this attempted distinction between status and conduct. See *Christian Legal Soc'y, Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 689 (2010) ("CLS contends that it does not exclude individuals because of sexual orientation, but rather 'on the basis of a conjunction of conduct and the belief that the conduct is not wrong.' Our decisions have declined to distinguish between status and conduct in this context." (internal citation omitted)). In fact, in today's debates over religious freedom—in court filings, in legislative debates, and in the media—legislators and business owners alike claim that they are not anti-LGBT and simply are not seeking to discriminate based on SOGI when claiming religious freedom. They even argue "misunderstanding" and "confusion" when opponents argue that religious exemption laws are really about a license to discriminate. See Tony Cook, *Gov. Mike Pence Signs 'Religious Freedom' Bill in Private*,

The revised rhetoric is a bait and switch: What begins as a seemingly innocuous request to protect individual religious liberty is then revealed as a vehicle to engage in SOGI discrimination without fear of reprisal. The goal is a quasi-church-state where only one religion enjoys religious freedom: theirs.

## 2. The State of the Law for LGBT Americans

Before describing the interest convergence between the foreign policy and national security communities and the LGBT civil rights movement, it is necessary to describe the legal landscape concerning LGBT civil rights and religious freedom laws. The description of this legal landscape contextualizes the interest convergence argument that follows.

Currently, twenty-two states have an antidiscrimination statute that protects on the basis of SOGI in some form.<sup>167</sup> Twenty of these states include protection against discrimination based both on sexual orientation and gender identity/expression in employment, housing, and public accommodations.<sup>168</sup> New York protects against sexual orientation discrimination and gender identity discrimination in employment, housing, and public accommodations, but only protects against sexual orientation discrimination in credit.<sup>169</sup> New Hampshire and Wisconsin protect against discrimination based on sexual orientation only in employment, housing, and public accommodations, but not credit.<sup>170</sup> Finally, Utah protects against discrimination based on SOGI in employment and housing, but not in public accommodations or credit.<sup>171</sup>

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INDYSTAR, (Mar. 25, 2015), <http://www.indystar.com/story/news/politics/2015/03/25/gov-mike-pence-sign-religious-freedom-bill-thursday/70448858/> [https://perma.cc/J8T4-AWSJ] (“This bill is not about discrimination, . . . and if I thought it legalized discrimination I would have vetoed it.”).

<sup>167</sup> These states are: California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Maine, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. See *Non-discrimination Laws*, *supra* note 8. Colorado, Connecticut, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Rhode Island, Vermont, and Washington also protect against SOGI discrimination in credit. *Id.* (follow “Credit” hyperlink).

<sup>168</sup> These states are: California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. See *id.* (follow “Credit”, “Housing”, and “Public Accommodations” links). Colorado, Connecticut, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, Rhode Island, Vermont, and Washington also protect against SOGI discrimination in credit. *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* By definition, the Antidiscrimination Question requires that a state have an antidiscrimination statute. To date, there is no federal antidiscrimination law that protects against sexual orientation and gender identity discrimination. See Teleicia J.R. Dambreville, *The Equality Act: Federal Anti-LGBTQ Discrimination Law*



Approximately twenty-eight states do not have a statute that prohibits discrimination based on SOGI, and there is currently no federal law that prohibits such discrimination.<sup>172</sup> This patchwork of protection from discrimination renders LGBT Americans in many states vulnerable to legal discrimination—a situation that is antithetical to America’s foundational values of democracy and equality.

*B. The Establishment Clause, Religious Freedom Laws, and LGBT Civil Rights*

Having provided the legal context for LGBT civil rights, it is next necessary to describe the current landscape of religious freedom laws, beginning with the foundational, constitutional protections embodied in the Establishment Clause. After describing these constitutional protections, this part discusses the shifting narrative of the Religious Right in its quest to redefine these constitutional principles.

1. The Establishment Clause

Before discussing religious freedom laws, a brief overview of the Establishment Clause and its contours is necessary. Moreover, the traditional definition of “religious freedom” is an important normative starting point for analyzing and appreciating the fundamental change sought by the Religious Right in its overhauled, *Hobby Lobby*-inspired strategy.

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*Introduced in Congress*, HR LEGALIST (July 24, 2015), <http://www.hrlegalist.com/2015/07/the-equality-act-federal-anti-lgbtq-discrimination-law-introduced-in-congress/> [https://perma.cc/7Y9A-JPMK]. Thus, the Antidiscrimination Question may only arise in the twenty-three states that have an antidiscrimination law that includes protections based on SOGI. In the twenty-eight states without such an antidiscrimination law, businesses may freely discriminate against LGBT people in employment, housing, public accommodations, and credit. See *Non-discrimination Laws*, *supra* note 8.

<sup>172</sup> In the absence of a federal statute prohibiting discrimination based on sexual orientation and gender identity, the EEOC, along with a growing number of courts and executive agencies, has taken the position that sexual orientation discrimination is a form of sex discrimination prohibited by Title VII, the federal civil rights law that prohibits discrimination against employees on the basis of sex, race, color, national origin, and religion. See *Facts About Discrimination in Federal Government Employment Based on Marital Status, Political Affiliation, Status as a Parent, Sexual Orientation, and Gender Identity*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/federal/other-protections.cfm> [https://perma.cc/5NTD-H6GP]. So while LGBT people and our allies continue to push for clear, consistent, and explicit protections at the state, local, and federal levels, there has been significant progress—progress that has resulted in legal recourse for LGBT people who have been fired in states without an antidiscrimination statute that includes sexual orientation and gender identity. The Title VII argument is that discrimination based on sexual orientation or gender identity “run[s] afoul of Title VII’s historic prohibition against discrimination ‘because of sex.’” Brief of Amici Curiae ACLU, *supra* note 18, at 1.

The First Amendment's Establishment Clause mandates that "Congress shall make no law respecting an establishment of religion."<sup>173</sup> The United States Supreme Court has interpreted the Establishment Clause to mean that neither state nor federal governments may "pass laws which aid one religion, aid all religions, or prefer one religion over another."<sup>174</sup> The scope of the Establishment Clause has frequently been litigated and has resulted in a large body of case law and scholarship; an extensive summary and analysis of which is outside the scope of this article. For purposes of the interest convergence argument made herein, however, a brief explanation of the Establishment Clause and its relationship to current "religious freedom" laws and expressly anti-LGBT laws is needed.

The baseline, black-letter law regarding the Establishment Clause is that it does *not* ban "federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions."<sup>175</sup> In other words, when a law that has religious origins or religious motivations also has a secular rationale, that law may be valid under the Establishment Clause.<sup>176</sup>

The modern Establishment Clause test was articulated in *Lemon v. Kurtzman*,<sup>177</sup> in which the Court evaluated whether laws that gave financial support for the teaching of secular subjects in religious schools violated the clause.<sup>178</sup> The decision created the three-prong *Lemon* test for determining whether a law violates the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, finally, the statute must not foster 'an excessive government entanglement with religion.'"<sup>179</sup> With regard to the secular governmental purpose, the articulated secular purpose must be genuine; if it is a sham, courts may reject it and properly find that the law is impermissibly grounded in religion.<sup>180</sup> Thus, the Supreme Court's Establishment Clause

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<sup>173</sup> U.S. CONST. amend. I.

<sup>174</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947).

<sup>175</sup> *McGowan v. Maryland*, 366 U.S. 420, 442 (1961) (upholding Maryland's Sunday Closing Laws, even though they originally were "motivated by religious forces," because they were supported by secular rationale (a uniform day of rest) and thus no longer retained their religious character).

<sup>176</sup> *See, e.g., id.*

<sup>177</sup> 403 U.S. 602, 606 (1971).

<sup>178</sup> *Id.* at 620–22.

<sup>179</sup> *Id.* at 612–13 (internal citations omitted).

<sup>180</sup> *See, e.g., Edwards v. Aguillard*, 482 U.S. 578, 586 (1987) (striking down Louisiana's Creation Science statute, which the legislature had justified with an academic freedom rationale, holding such rationale was disingenuous).

jurisprudence provides a “doctrinal basis for inquiring into the actual purpose of a law, even in circumstances in which the sponsors profess a legitimate secular purpose.”<sup>181</sup> The power of a court to critically interrogate a law with a purportedly secular purpose is an important power to keep in mind when considering the new wave of anti-LGBT laws.

Scholars have made arguments that anti-LGBT laws violate the Establishment Clause when they are impermissibly motivated by religious objectives.<sup>182</sup> These scholars argue that courts should strike such laws because impartial observers would recognize that they are an effort to affirm the belief systems of certain fundamentalist Christian groups.<sup>183</sup> Such a result would be one avenue to remedy discrimination based on sexual orientation and gender identity.<sup>184</sup>

These scholars articulated such positions and prescriptions in the mid-1990s when the Religious Right was active in passing a wave of anti-LGBT laws.<sup>185</sup> Courts largely rejected these arguments, though courts often struck down these laws on other grounds.<sup>186</sup> Nevertheless, the anti-Establishment argument may gain new-found relevance today with the passage of anti-LGBT laws, described below, which are expressly grounded in Christianity.<sup>187</sup>

Religious freedom is a critical tenet of the Establishment Clause. As originally contemplated by America’s founders, religious freedom “is the right of individual conscience; to believe as we will and to change our minds freely, without undue influence from government or from powerful religious institutions.”<sup>188</sup> The religious freedom guaranteed by the First Amendment is “integral to the idea of separation of church and state. Separation exists not to limit religious expression, but to *safeguard against creeping religious supremacism and the theocratic temptations* that have persisted throughout American

<sup>181</sup> Marc L. Rubinstein, Note, *Gay Rights and Religion: A Doctrinal Approach to the Argument that Anti-gay-rights Initiatives Violate the Establishment Clause*, 46 HASTINGS L.J. 1585, 1602 (1995).

<sup>182</sup> *Id.* at 1592.

<sup>183</sup> *Id.*; see generally David A.J. Richards, *Sexual Preference as a Suspect (Religious) Classification: An Alternative Perspective on the Unconstitutionality of the Anti-lesbian/gay Initiatives*, 55 OHIO ST. L.J. 491, 493 (1994) (contending that the strongest argument for constitutional limits on anti-LGBT initiatives is that such laws are based on “constitutionally forbidden sectarian religious intolerance against the fundamental rights of conscience, speech, and association of lesbian and gay persons”).

<sup>184</sup> Rubinstein, *supra* note 181, at 1592–93.

<sup>185</sup> See, e.g., *id.*

<sup>186</sup> *Id.* at 1595 n.52 (indicating the cases in which “Establishment Clause challenges to laws affecting gay and lesbian rights” were rejected).

<sup>187</sup> See *infra* Section III.B.2.

<sup>188</sup> CLARKSON, *supra* note 15, at 2.

history into the present.”<sup>189</sup> Put another way, the drafters of the Establishment Clause “sought to control the passions of religious majorities, not institutionalize them in state practice.”<sup>190</sup>

Whether the new anti-LGBT laws are ultimately struck down as violations of the Establishment Clause is not dispositive to this article’s position that there is an interest convergence between LGBT civil rights advocates and those in the foreign policy and national security communities. What is key to the interest convergence argument this article sets forth is the uncontestable fact that these laws are expressly grounded in the Religious Right’s interpretation of Christianity, and they thus seek to redefine religious freedom in America. As such, they appear to the general public as quasi-theocratic and can fairly be characterized as anti-Establishment because they “are largely the product of religious forces attempting to cement their vision of homosexuality onto the secular polity.”<sup>191</sup> It is the anti-Establishment *nature* and *character* of these laws—not whether they are ultimately held to violate the Establishment Clause—that create foreign policy and national security risks for the United States.

## 2. Religious Freedom Laws and LGBT Civil Rights

The Religious Right’s shifting narrative, described above, has become operationalized through litigation and legislation over the past few years as the Religious Right began to rely on state RFRAs to seek exemptions from antidiscrimination laws and to pass explicitly anti-LGBT laws.

The possibility of using “religious freedom” as a weapon against LGBT people gained traction after the United States Supreme Court’s 2014 decision in *Burwell v. Hobby Lobby*.<sup>192</sup> The Court held that a for-profit corporation is a “person” and can thus hold religious beliefs under the federal RFRA.<sup>193</sup> It further held that the contraceptive coverage mandate violated the sincerely held religious beliefs of the Hobby Lobby corporation.<sup>194</sup> The Court reasoned that the challenged regulation was not the least restrictive means for the government to achieve its

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<sup>189</sup> *Id.* (emphasis added).

<sup>190</sup> HERMAN, *supra* note 100, at 189.

<sup>191</sup> Rubinstein, *supra* note 181, at 1603.

<sup>192</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781–83 (2014).

<sup>193</sup> *Id.* at 2768–69.

<sup>194</sup> *Id.* at 2766, 2779 (noting that the sincerely held religious belief was that “life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point”).

compelling state interest (“ensuring that all women have access to all FDA-approved contraceptives without cost sharing”).<sup>195</sup>

The Religious Right became even more mobilized to assert its anti-Establishment mission after the Court handed down its marriage equality decision, *Obergefell v. Hodges*, in 2015.<sup>196</sup> It is now seeking to use existing state RFRAs, and to pass new state RFRAs, to “allow for-profit businesses to seek religious exemptions in the way the *Hobby Lobby* case made possible under the federal RFRA.”<sup>197</sup>

“Religious freedom” laws were historically grounded in a conceptualization of religious freedom that emphasized “an individual’s free exercise of religion and conscience.”<sup>198</sup> In recent years, however—particularly since *Hobby Lobby* made its way through the federal court system—religious freedom is “being redefined as the right to discriminate and impose a conservative social order in the name of religion.”<sup>199</sup> Twenty-one states have religious exemption laws, either through a statute or constitutional amendment.<sup>200</sup> Two of these laws took effect after *Hobby Lobby*.<sup>201</sup> In the 2016 legislative sessions, twelve states proposed RFRAs;<sup>202</sup> the 2017 sessions will see four states introduce religious exemptions laws, five states introduce RFRAs, four states introduce laws relating to identity documents, sixteen states introduce “bathroom bills,” and eight states introduce marriage-related exemption laws.<sup>203</sup>

The backers of these religious exemption laws have become more transparent in the past two decades in two ways. First, the proponents of these laws have made explicit what members of the LGBT-rights movement have understood to be their goal all along, namely to use religious exemption laws to target and discriminate against LGBT people.<sup>204</sup> Second, the

<sup>195</sup> *Id.* at 2779–80.

<sup>196</sup> “The Christian Right is now busy seeking to limit the implementation of the decision and to make it as unworkable as possible, in part by attempting to subject it to a death of a thousand exemptions.” CLARKSON, *supra* note 15, at 9.

<sup>197</sup> *Id.* at vii.

<sup>198</sup> Patricia Miller, *Religious Freedom Advocates Warn of “Theocratic Zones of Control”*, RELIGION DISPATCHES (Jan. 13, 2016), <http://religiondispatches.org/religious-freedom-advocates-warn-of-theocratic-zones-of-control/> [<https://perma.cc/BX65-R3U8>].

<sup>199</sup> *Id.*

<sup>200</sup> See *State Religious Exemption Laws*, MAP, [http://www.lgbtmap.org/equality-maps/religious\\_exemption\\_laws](http://www.lgbtmap.org/equality-maps/religious_exemption_laws) [<https://perma.cc/F8XV-FBC2>].

<sup>201</sup> See David Johnson & Katy Steinmetz, *This Map Shows Every States with Religious Freedom Laws*, TIME (Apr. 2, 2015), <http://time.com/3766173/religious-freedom-laws-map-timeline/> [<https://perma.cc/DF62-D83F>].

<sup>202</sup> *Past Anti-LGBT Religious Exemption Legislation Across the Country*, ACLU, <https://www.aclu.org/other/past-anti-lgbt-religious-exemption-legislation-across-country?redirect=anti-lgbt-religious-refusals-legislation-across-country> [<https://perma.cc/BCC8-ZP6E>].

<sup>203</sup> *Id.*

<sup>204</sup> See *id.*

proponents have begun to argue more vigorously that religious exemption laws should trump antidiscrimination laws in an effort to realize their vision of an America where their religious beliefs—but not others’—overtake the rule of law.<sup>205</sup>

This trend toward transparency was apparent in the 2016 state legislative sessions, where bills that are anti-Establishment on their face were introduced and, in some cases, passed into law. In those sessions, twenty-nine states saw the introduction of some form of religious exemption laws, some of which mirrored the federal RFRA, which does not mention SOGI at all, and some that expressly referred to religion vis-à-vis SOGI and same-sex marriage.<sup>206</sup> These took the form of marriage-related “religious freedom” laws; “First Amendment Defense Acts,” that would permit government employees to refuse to perform same-sex marriages or issue licenses to same-sex couples based on their religion; “Commercial Wedding Services” laws that would allow for-profit businesses to refuse to provide goods and services relating to same-sex marriage based on the service owner’s religion; “Pastor Protection Acts;” and other forms of a marriage exemption bills.<sup>207</sup> These proposed laws and amendments have the express goal of creating “zones of legal exemption”<sup>208</sup> in civil and commercial society based on religion.

For example, in April 2016, the Mississippi legislature passed, and the governor signed, a law titled “Protecting Freedom of Conscience from Government Discrimination Act,” but more commonly referred to as HB 1523.<sup>209</sup> It was passed in direct response to *Obergefell v. Hodges*.<sup>210</sup> It was slated to become law on July 1, 2016,<sup>211</sup> but on June 30, 2016, a federal court enjoined the bill.<sup>212</sup>

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<sup>205</sup> See, e.g., Jenn Stanley, *Indiana Governor: “Religious Freedom” Should Trump Civil Rights*, RH REALITY CHECK (Jan. 14, 2016), <http://rhrealitycheck.org/article/2016/01/14/indiana-governor-religious-freedom-trump-civil-rights/> [https://perma.cc/SK5Q-4ANA].

<sup>206</sup> There is a distinction to be made between the federal RFRA and the state mini-RFRAs and the new wave of religiously based anti-LGBT laws that emerged in 2016 and will continue to be introduced in 2017. While traditional RFRAs serve to elevate religious preferences over some laws, including antidiscrimination laws, regardless of the religion, the new wave of religiously motivated anti-LGBT bills elevate *certain religious objections*—conservative Christian ones—over antidiscrimination laws. While both types of religious exemption laws inform the interest convergence for which I argue, the new wave of these laws is particularly powerful in creating and supporting the interest convergence because they appear to be anti-Establishment on their face.

<sup>207</sup> See *Past Anti-LGBT Religious Exemption Legislation Across the Country*, *supra* note 202.

<sup>208</sup> Miller, *supra* note 198.

<sup>209</sup> HB 1523, 2016 Leg., Reg. Sess. (Miss. 2016).

<sup>210</sup> *Barber v. Bryant*, 193 F. Supp. 3d 677, 689 (S.D. Miss. 2016).

<sup>211</sup> *Id.* 687.

<sup>212</sup> *Id.* at 724.

HB 1523 spelled out three “sincerely held religious beliefs or moral convictions” entitled to special legal protection: First, that “[m]arriage is or should be recognized as the union of one man and one woman”; second, that “[s]exual relations are properly reserved to such a marriage”; and third, that “[m]ale (man) or female (woman) refer to an individual’s immutable biological sex as objectively determined by anatomy and genetics at time of birth.”<sup>213</sup> Section 3 of the bill then said that Mississippi cannot “discriminate” against persons who act pursuant to any of the beliefs enumerated in Section 2.<sup>214</sup> The enjoining court described the everyday impact of HB 1523:

For example, if a small business owner declines to provide goods or services for a same-sex wedding because it would violate his or her § 2 beliefs, HB 1523 allows the business to decline without fear of State “discrimination.”

“Discrimination” is defined broadly. It covers consequences in the realm of taxation, employment, benefits, court proceedings, licenses, financial grants, and so on. In other words, the State of Mississippi will not tax you, penalize you, fire you, deny you a contract, withhold a diploma or license, modify a custody agreement, or retaliate against you, among many other enumerated things, for your § 2 beliefs. An organization or person who acts on a § 2 belief is essentially immune from State punishment.<sup>215</sup>

The Human Rights Campaign, a national LGBT advocacy group described HB 1523 as a “horrific measure” that “would allow individuals, religious organizations and private associations to use religion to discriminate against LGBT Mississippians in some of the most important aspects of their lives, including at work, at schools, and in their communities.”<sup>216</sup>

Importantly, for this article’s interest convergence argument, HB 1523 is anti-Establishment on its face. It favors one religion’s beliefs over all others and over the rule of law. As described more fully below, this anti-Establishment goal of the Religious Right parallels the theocratic goal of the EITN.

Another example is North Carolina’s “Public Facilities Privacy & Security Act,” more commonly referred to as HB 2.<sup>217</sup> Signed into law in March 2016, HB 2 (1) terminated all local nondiscrimination laws that prohibited discrimination based on

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<sup>213</sup> H.B. 1523 § 2, 2016 Leg., Reg. Sess. (Miss. 2016).

<sup>214</sup> *Id.* §§ 3, 4.

<sup>215</sup> *Barber*, 193 F. Supp. 3d at 694 (footnote omitted) (internal citation omitted).

<sup>216</sup> *Mississippi Governor Phil Bryant Signs Law Attacking LGBT People and Families*, HUMAN RIGHTS CAMPAIGN (Apr. 5, 2016), <http://www.hrc.org/blog/mississippi-governor-phil-bryant-signs-law-attacking-lgbt-people-and-families> [https://perma.cc/SCY3-ERH7].

<sup>217</sup> H.B. 2, 2016 Gen. Assemb., Extra Sess. (N.C. 2016).

SOGI, (2) prohibited such provisions from being passed by cities, municipalities, or agencies in the future, and (3) “force[d] transgender students in public schools to use restrooms and other facilities inconsistent with their gender identity.”<sup>218</sup> The state legislature passed HB 2 in response to the City of Charlotte passing an LGBT antidiscrimination ordinance.<sup>219</sup> HB 2 was rushed through a special session of the North Carolina legislature—specifically convened to pass it—and signed into law, all in the course of twelve hours.<sup>220</sup> While not anti-Establishment on its face, HB 2 nonetheless bears the imprimatur of the Religious Right and its quasi-theocratic vision.

In total, over 200 laws targeting LGBT people were introduced in state legislatures in 2016.<sup>221</sup> These “sweeping” laws are aimed at threatening all aspects of the lives of LGBT people, by “impairing the ability to receive services that are taxpayer-funded, [and] undermining protections that have been passed in cities across the country [ ] designed to ensure that any individual who goes into a store and seeks services is guaranteed the ability to receive those services if they can pay for them.”<sup>222</sup> These laws are consistent with the new narrative of the Religious Right, and the anti-Establishment intention behind them is clear.

The increase in legislation based on religious liberty is not confined to the states. On June 17, 2015, Representative Raul Labrador of Idaho, along with 171 cosponsors, introduced the First Amendment Defense Act (FADA) in the United States House of Representatives.<sup>223</sup> These bills prohibit the federal government from discriminating against any person based on that person’s moral or religious beliefs that same-sex marriage

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<sup>218</sup> Press Release, Human Rights Campaign, NC Gov. Signs Radical Bill into Law Attacking Transgender Students and Overturning LGBT Protections (Mar. 23, 2016), <http://www.hrc.org/press/nc-gov.-signs-radical-bill-into-law-attacking-transgender-students-overturn> [https://perma.cc/5FDJ-CMTT].

<sup>219</sup> *Id.*

<sup>220</sup> Camila Domonoske, *North Carolina Passes Law Blocking Measures to Protect LGBT People*, NPR (Mar. 24, 2016), <http://www.npr.org/sections/thetwo-way/2016/03/24/471700323/north-carolina-passes-law-blocking-measures-to-protect-lgbt-people> [https://perma.cc/6P7N-MY58].

<sup>221</sup> *Orlando Massacre Comes After Lawmakers in U.S. Filed More Than 200 Anti-LGBT Bills*, DEMOCRACY NOW! (June 13, 2016), [http://www.democracynow.org/2016/6/13/orlando\\_massacre\\_comes\\_after\\_lawmakers\\_in](http://www.democracynow.org/2016/6/13/orlando_massacre_comes_after_lawmakers_in) [https://perma.cc/Z2VG-57PH] (citing Chase Strangio (@chasestrangio), TWITTER (June 12, 2016, 7:31 AM), <https://twitter.com/chasestrangio/status/742001494489223168> [https://perma.cc/HNY5-ASX2]).

<sup>222</sup> *State Religious Freedom Laws*, C-SPAN (Mar. 31, 2016), <https://www.c-span.org/video/?407048-3/washington-journal-roundtable-state-religious-objection-laws>.

<sup>223</sup> See First Amendment Defense Act, H.R. 2802, 114th Cong. (2015). An identical bill was introduced in the United States Senate on the same day. See First Amendment Defense Act, S. 1598, 114th Cong. (2015).



and sexual activity outside of marriage is wrong.<sup>224</sup> In an effort to expand the *Hobby Lobby* holding, it defines a “person” as “any person regardless of religious affiliation, including corporations and other entities regardless of for-profit or nonprofit status.”<sup>225</sup>

FADA is an extreme, regressive piece of legislation that “would sanction unprecedented taxpayer-funded discrimination against LGBTQ people.”<sup>226</sup> Moreover, notwithstanding that *Obergefell* recognized that same-sex couples share in the fundamental right to marry, FADA would permit individual businesses to disregard the civil rights of married LGBT couples.<sup>227</sup> Like MS 1523, FADA is anti-Establishment on its face.

Thus, the new rights-based narrative of the Religious Right dovetails with its legal strategy; in the court of public opinion and the court of law, the Religious Right is attempting to use a cornerstone of our constitutional democracy as a sword with which to discriminate, as a “free pass” to pick and choose which laws its members must follow and which they may ignore. The Religious Right’s wave of new anti-LGBT legislation, and its legal arguments in cases presenting the Antidiscrimination Question, just like its narrative in the public square, are an attempt to manipulate and contort the meaning of religious liberty “to the point that it becomes the means by which their theocratic vision is finally and fully realized.”<sup>228</sup> Based on the Court’s *Hobby Lobby* decision, the Religious Right and Republicans are now turning their attention to passing laws that “put religious freedom on steroids.”<sup>229</sup>

In sum, the Religious Right’s strategy is to radically change our long-held understanding of religious freedom as inseparable from religious pluralism to one that favors one religion over all others—their own. If the Religious Right has its way, religious freedom in America will become religious freedom *only* for the beliefs and dogmas of the Religious Right;

<sup>224</sup> First Amendment Defense Act, H.R. 2802.

<sup>225</sup> *Id.*

<sup>226</sup> Stephen Peters, *On One Month Anniversary of Orlando Attack, House Will Hold Hearing on Anti-LGBTQ Legislation*, HUMAN RIGHTS CAMPAIGN (July 6, 2016), <http://www.hrc.org/blog/on-one-month-anniversary-of-orlando-attack-house-to-hold-hearing/> [<https://perma.cc/6NKC-NB8S>].

<sup>227</sup> *Id.* Other commentators have noted that FADA is “legislation entrenching legal discrimination” and that it “does not actually defend the First Amendment, but rather gives individuals wide leeway for bigotry.” Jill Filipovic, *How a Woman Could Get Fired for Having Premarital Sex: The First Amendment Defense Act Is the Latest Attempt to Discriminate in the Name of “Religious Freedom”*, COSMOPOLITAN (July 14, 2016), <http://www.cosmopolitan.com/politics/news/a61318/fada-first-amendment-defense-act-religious-freedom-congress/> [<https://perma.cc/87MK-DFBU>].

<sup>228</sup> CLARKSON, *supra* note 15, at v (preface of Rev. John C. Dorhauer, General Minister and President, United Church of Christ).

<sup>229</sup> Filipovic, *supra* note 227.

thus, religious freedom will not be “free” at all and will morph into a concept that contradicts the religious pluralism envisioned by the framers of the Constitution and the Bill of Rights.<sup>230</sup> It is the anti-Establishment, quasi-theocratic nature of this strategy that is the point of interest convergence between the LGBT civil rights movement and the foreign policy and national security communities.<sup>231</sup> This convergence emerges because, in order to have legitimacy in its message of—and quest to establish—religious pluralism in emerging democracies around the world, the United States must actually practice religious pluralism at home.

C. *The Religious Right’s Efforts to Operationalize Its New Narrative: The Wedding Services Cases*

The Religious Right’s new rights-based rhetoric of victimhood informs its legal arguments in the religious exemption cases. In these cases, small, for-profit businesses argued that they should be exempt from a state’s antidiscrimination law based on their religious beliefs about homosexuality and same-sex marriage.<sup>232</sup> The businesses and their owners relied on some combination of three legal arguments in these cases: (1) that the state RFRA excuses compliance with the state antidiscrimination law (more recent cases cited *Hobby Lobby* to support this assertion),<sup>233</sup> (2) the First Amendment’s Free Speech Clause prohibits enforcement of the state’s antidiscrimination statute inasmuch as the antidiscrimination statutes unconstitutionally compel speech, expressive conduct, and symbolic speech,<sup>234</sup> and (3) the First Amendment’s Free Exercise Clause prohibits enforcement of the state’s antidiscrimination statute. Two recent cases illustrate this marriage of the Religious Right’s new narrative to its new legal strategy.

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<sup>230</sup> CLARKSON, *supra* note 15, at 4.

<sup>231</sup> *See infra* Part V.

<sup>232</sup> *See supra* note 166.

<sup>233</sup> Most state RFRAs track the federal RFRA, which forbids the government from substantially burdening “a person’s exercise of religion even if the burden results from a rule of general applicability” unless the government can demonstrate that the “application of the burden to the person—(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000bb-1(a)–(b) (2012).

<sup>234</sup> Specifically, the litigants contend that antidiscrimination statutes unconstitutionally compel speech and/or expressive conduct and symbolic speech.

## 1. The RFRA Argument

In *Elane Photography, LLC v. Willcock*,<sup>235</sup> a commercial photography studio, co-owned by a husband and wife, was found to have violated the New Mexico Human Rights Act (NMHRA) when it refused to photograph a lesbian wedding.<sup>236</sup> In response, it argued that forcing it to comply with NMHRA, when such compliance was against the owners' personal religious beliefs, violated New Mexico's RFRA, impermissibly compelled speech, and violated the Free Exercise Clause.

The New Mexico Supreme Court rejected *Elane Photography*'s reliance on the New Mexico RFRA. It held that New Mexico's RFRA did not apply in a suit between two private parties; rather, it only applied when a government agency is alleged to have restricted a person's free exercise right and when the government is thus a party to the suit.<sup>237</sup> The New Mexico Supreme Court got it right—neither the federal RFRA nor state RFRA should apply in suits between private individuals. Because *Hobby Lobby* involved the federal government as a party, in fact as *the* party that was allegedly infringing on the plaintiffs' free exercise right, *Hobby Lobby* does not contradict the New Mexico Supreme Court's holding with regard to the New Mexico RFRA.

## 2. The Compelled Speech Argument

In an alternative, constitutional argument, the *Elane Photography* defendants argued that forcing it to comply with NMHRA, when such compliance was against the owners' personal religious beliefs, impermissibly compelled speech: "Elane Photography concludes that by requiring it to photograph same-sex weddings . . . the NMHRA unconstitutionally compels it to 'create and engage in expression' that sends a positive message about same-sex marriage not shared by its owner."<sup>238</sup> The court held that the NMHRA does not compel endorsement of any government message; moreover, the purpose behind antidiscrimination laws goes well beyond expressing any government's message because they (1) protect individuals

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<sup>235</sup> 309 P.3d 53 (N.M. 2013).

<sup>236</sup> *Id.* at 60.

<sup>237</sup> *Id.* at 76.

<sup>238</sup> *Id.* at 63.

from humiliation and dignitary harm and (2) guarantee that goods and services are freely obtainable in the marketplace.<sup>239</sup>

In *Craig v. Masterpiece Cakeshop, Inc.*, a Colorado bakery, owned by an individual, was held to have violated the Colorado Anti-Discrimination Act (CADA) when it refused to bake a wedding cake for a gay male couple.<sup>240</sup> In its defense, the bakery relied on the First Amendment (Colorado does not have an RFRA) to argue that “wedding cakes inherently convey a celebratory message about marriage and, therefore, the . . . order [finding a CADA violation] unconstitutionally compel[led] it to convey a celebratory message about same-sex marriage in conflict with its religious beliefs.”<sup>241</sup> The court rejected this argument: “[T]he act of designing and selling a wedding cake to all customers free of discrimination does not convey a celebratory message about same-sex weddings likely to be understood by those who view it.”<sup>242</sup> Moreover, the court reasoned, any attribution of a pro-same-sex-marriage message was only to the customer:

[T]o the extent that the public infers from a Masterpiece wedding cake a message celebrating same-sex marriage, that message is more likely to be attributed to the customer than to Masterpiece.

....

[B]ecause CADA prohibits all places of public accommodation from discriminating against customers because of their sexual orientation, it is unlikely that the public would view Masterpiece’s creation of a cake for a same-sex wedding celebration as an endorsement of that conduct.<sup>243</sup>

As such, the court held that reasonable observers would not understand Masterpiece’s compliance with CADA to be a reflection of its own beliefs.<sup>244</sup>

In addition, these two courts held that compliance with antidiscrimination statutes does not compel symbolic speech<sup>245</sup> because such compliance is not inherently expressive. First, the compelled conduct is refraining from discriminating against

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<sup>239</sup> See *id.* at 64–65 (citing *Daniel v. Paul*, 395 U.S. 298, 307–08 (1969); *Katzenbach v. McClung*, 379 U.S. 294, 299–300 (1964)); see also *Elane Photography*, 309 P.3d at 65 (holding state antidiscrimination law “does not require any affirmation of belief by regulated public accommodations; instead, it requires businesses that offer services to the public at large to provide those services without regard for race, sex, sexual orientation, or other protected classifications”).

<sup>240</sup> *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 283, 286 (Colo. App. 2015).

<sup>241</sup> *Id.* at 283.

<sup>242</sup> *Id.* at 286.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 287–88.

customers because of a protected characteristic.<sup>246</sup> Second, refraining from such discrimination does not send any particular message about the would-be discriminator's views on LGBT people or marriage for same-sex couples.<sup>247</sup> Third, even if such a particularized message was sent, it is unlikely that a reasonable observer would both comprehend that message and attribute it to the would-be discriminator.<sup>248</sup> Finally, these for-profit corporations retain their First Amendment right to express their religious views.<sup>249</sup> These courts reasoned that because these for-profit entities charge their customers for goods and services, the possibility that customers or the general public will make any connection between the for-profit corporation's sale of goods or services to LGBT people or same-sex couples, and the views of the for-profit corporation on either of those topics, is remote at best.<sup>250</sup>

The *Elane Photography* and *Masterpiece Cakeshop* courts got it right: requiring compliance with antidiscrimination statutes does not infringe on any First Amendment free speech rights.

### 3. The Free Exercise Argument

The final argument made by would-be discriminators is that antidiscrimination laws violate the Free Exercise Clause of the First Amendment. The Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise" of religion.<sup>251</sup> The Supreme Court has interpreted this clause to mean "the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all 'governmental regulation of religious

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<sup>246</sup> See *id.* at 286 ("Masterpiece does not convey a message supporting same-sex marriages merely by abiding by the law and serving its customers equally."); see also *Elane Photography, LLC v. Willcock*, 309 P.3d 53, 69–70 (N.M. 2013) ("Reasonable observers are unlikely to interpret Elane Photography's photographs as an endorsement of the photographed events. It is well known to the public that wedding photographers are hired by paying customers and that a photographer may not share the happy couple's views on issues ranging from the minor (the color scheme, the hors d'oeuvres) to the decidedly major (the religious service, the choice of bride or groom).").

<sup>247</sup> *Masterpiece Cakeshop, Inc.*, 370 P.3d at 286; *Elane Photography*, 309 P.3d at 69–70.

<sup>248</sup> See *Masterpiece Cakeshop, Inc.*, 370 P.3d at 286.

<sup>249</sup> "They may, for example, post a disclaimer on their website or in their studio advertising that they oppose same-sex marriage but that they comply with applicable antidiscrimination laws." *Elane Photography*, 309 P.3d at 70.

<sup>250</sup> *Id.* at 69–70; see also *Masterpiece Cakeshop, Inc.*, 370 P.3d at 287 ("The fact that an entity charges for its goods and services reduces the likelihood that a reasonable observer will believe that it supports the message expressed in its finished product.").

<sup>251</sup> U.S. CONST. amend. I.

*beliefs* as such.”<sup>252</sup> Moreover, the government is prohibited from forcing the affirmation of any religious belief,<sup>253</sup> from “punish[ing] the expression of religious doctrines it believes to be false,”<sup>254</sup> from imposing “special disabilities on the basis of religious views or religious status,”<sup>255</sup> and from lending “its power to one or the other side in controversies over religious authority or dogma.”<sup>256</sup>

The Court’s free exercise jurisprudence, particularly *Employment Division, Department of Human Resources v. Smith*, makes clear that there are well-defined limits to the right to free exercise of religion.<sup>257</sup> In *Smith*, drug counselors were fired for ingesting peyote—in violation of a state criminal statute—which they did as part of a religious ceremony.<sup>258</sup> Because they were fired for “misconduct”—ingestion of the drug—they were denied unemployment benefits.<sup>259</sup> They challenged that denial by arguing that the criminal statute and the unemployment compensation law infringed on their right of the free exercise of religion under the First Amendment. They thus argued for a religious exemption from the state’s criminal law and unemployment law.<sup>260</sup> The Supreme Court rejected this argument and instead held that neutral laws of general applicability that burden religion—of which the laws in question were—do *not* need to meet the “compelling government interest” test.<sup>261</sup>

The Colorado and New Mexico decisions, discussed above, applied *Smith*—because Colorado has no RFRA and because the New Mexico Supreme Court held that the state’s

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<sup>252</sup> *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990) (quoting *Sherbert v. Verner*, 374 U.S. 398, 402 (1963)).

<sup>253</sup> *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961).

<sup>254</sup> *Smith*, 494 U.S. at 877.

<sup>255</sup> *Id.*

<sup>256</sup> Lawrence Sager, *Why Churches (and Possibly the Tarpon Bay Women’s Blue Water Fishing Club) Can Discriminate*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 96 (Chad Flanders et al. eds., 2016) (quoting *Smith*, 494 U.S. at 877).

<sup>257</sup> *Smith*, 494 U.S. at 906–07 (O’Connor, J., concurring).

<sup>258</sup> *Id.* at 874.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 878 (“Respondents . . . seek to carry the meaning of ‘prohibiting the free exercise [of religion]’ one large step further. They contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons.”).

<sup>261</sup> *Id.* at 878–90. This holding, which is inapplicable here because antidiscrimination statutes *do* meet the compelling state interest test, created a national uproar and resulted in the eventual passage of the federal RFRA. In its original form, the federal RFRA purported to apply to both the federal and state governments, thus completely abrogating *Smith*. However, the Court held in *City of Boerne v. Flores* that Congress overstepped its authority in extending the federal RFRA to state governments. *City of Boerne v. Flores*, 521 U.S. 507, 533–34 (1997). Thus, *Smith* continues to be controlling precedent in the states on the issue of religious exemptions from neutral, generally applicable laws based on the Free Exercise Clause.

RFRA did not apply—and held that antidiscrimination laws are “neutral law[s] of general applicability” and thus do not impermissibly violate the right to the free exercise of religion.<sup>262</sup>

To date, courts that have considered the Antidiscrimination Question have rejected the legal arguments put forth by the Religious Right. It takes little effort to unmask these legal arguments for what they are—part of the Religious Right’s long-game: to establish “a conservative Christian social order inspired by religious law. To achieve this goal, they seek to remove religious freedom as an integral part of religious pluralism and constitutional democracy, and redefine it in Orwellian fashion to justify discrimination by an ever wider array of ‘religified’ institutions and businesses.”<sup>263</sup> As I contend below, courts that are faced with the Antidiscrimination Question in the future should reach the same conclusion, both because it is the correct outcome as a matter of law and because it is the right outcome for the foreign policy and national security interests of the United States.<sup>264</sup>

#### *D. Contemporary Issues in the United States’ Foreign Policy and National Security*

##### *1. The U.S. “War on Terror”*

The fifteen-plus years since the 9/11 attacks have seen a violent and unstable global environment unlike any other in history. This historically unique global landscape is the result of several factors including widespread networks of nonstate, terrorist actors and the power of technology—social media,

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<sup>262</sup> *Elane Photography, LLC v. Willcock*, 309 P.3d 53, 75 (N.M. 2013) (“We hold that the NMHRA is a neutral law of general applicability, and as such it does not offend the Free Exercise Clause of the First Amendment.”); *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 290 (Colo. App. 2015); *see also In re Klein*, 2015 WL 4868796, at \*65 (Or. Bureau of Labor & Indus. July 2, 2015).

<sup>263</sup> CLARKSON, *supra* note 15, at 1. Tony Perkins, president of the Family Research Council, the leading Religious Right organization in Washington, D.C., has insinuated that “the [United Church of Christ] is not really Christian, and that those who support LGBTQ rights don’t have the same rights as conservative Christians—because ‘true religious freedom’ only applies to ‘orthodox religious viewpoints.’” *Id.* at 26.

<sup>264</sup> As this article was going to press, the Supreme Court granted certiorari in *Masterpiece Cakeshop*. *See Masterpiece Cakeshop v. Col. Civ. Rights Comm’n*, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016) (en banc), *cert. granted*, 2017 WL 2722428 (U.S. July 26, 2017) (No. 15SC738). It is this author’s hope that the Supreme Court, in particular, will take this opportunity to unequivocally reject the Religious Right’s attempt to carve out broad religious exemptions to antidiscrimination laws, and in so doing, solidify LGBT civil rights while simultaneously fortifying the United States’ foreign policy and national security interests.

instantaneous communications, and encryption.<sup>265</sup> These create foreign policy and national security challenges unlike any previously faced by the United States.

The twenty-first century saw a very rough start in the United States. On September 11, 2001, three airplanes hijacked by followers of Osama bin Laden killed over 3000 people in New York, Pennsylvania, and Virginia.<sup>266</sup> Then-President George W. Bush promptly declared the United States' "War on Terror."<sup>267</sup> There were several goals for the War on Terror. First, the Bush administration sought to apprehend or kill Osama bin Laden, the leader of Al-Qaeda, a militant Islamic group that emerged in Pakistan in the 1990s after the Soviet Union withdrew from Afghanistan.<sup>268</sup> The United States achieved this goal a decade later, on May 2, 2011.<sup>269</sup> In addition, the United States sought to completely defeat the Taliban's reign in Afghanistan.<sup>270</sup> That goal has still not been met; instead, the United States' effort to facilitate the building of a free, democratic state in Afghanistan has faltered, with some commentators declaring the Taliban-toppling, nation-building effort a complete failure.<sup>271</sup> These goals concerning the Taliban and Afghanistan were part of both the U.S. foreign policy agenda—spreading democracy and freedom abroad—and the U.S. national security agenda—free democracies do not attack each other.<sup>272</sup>

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<sup>265</sup> See generally Joseph Anzalone, *Extraordinary Times Demand Extraordinary Measures: A Proposal to Establish an International Court for the Prosecution of Global Terrorists*, 16 U.C. DAVIS J. INT'L L. & POL'Y 273, 315 (2010).

<sup>266</sup> See *Current and Projected National Security Threats to the United States: Hearing Before the S. Select Comm. on Intelligence*, 107th Cong. 89 (2002) (testimony of Dale L. Watson, Exec. Assistant Dir., Counterterrorism/Counterintelligence Div., Federal Bureau of Investigation).

<sup>267</sup> See *Text: President Bush Addresses the Nation*, WASH. POST (Sept. 20, 2001), [http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress\\_092001.html](http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_092001.html) [<https://perma.cc/Q5TL-N4V3>].

<sup>268</sup> See *Mapping Militant Organizations*, STANFORD UNIV., <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/21> [<https://perma.cc/UAR3-WZC2>].

<sup>269</sup> *Death of Osama bin Laden Fast Facts*, CNN, <http://www.cnn.com/2013/09/09/world/death-of-osama-bin-laden-fast-facts/> [<https://perma.cc/F57C-NKNX>] (last updated Apr. 17, 2016).

<sup>270</sup> See *Who Are the Taliban?*, BBC NEWS (May 26, 2016), <http://www.bbc.com/news/world-south-asia-11451718> [<https://perma.cc/W4A2-9CBR>].

<sup>271</sup> See, e.g., Jim Michaels, *Decade of War, Billions in U.S. Aid Fail to Defeat Taliban*, USA TODAY (May 18, 2015), <http://www.usatoday.com/story/news/world/2015/05/18/us-fails-to-defeat-taliban-in-afghanistan/27234763/> [<https://perma.cc/A96J-NX6E>]; see also Reid Standish, *Taliban: U.S. Leaving Afghanistan in Defeat*, FOREIGN POL'Y (Dec. 29, 2014), <http://foreignpolicy.com/2014/12/29/taliban-u-s-leaving-afghanistan-in-defeat/> [<https://perma.cc/KRB4-4Z4L>].

<sup>272</sup> See NATIONAL STRATEGY FOR COMBATING TERRORISM (2006), <https://www.hsdl.org/?view&did=466588> [<https://perma.cc/Y432-MM42>].



The United States opened a different chapter in the War on Terror in 2003 when it invaded Iraq.<sup>273</sup> President Bush justified the invasion on his (and his administration's) contention that Iraq's leader, Saddam Hussein, had amassed weapons of mass destruction (WMD) that posed a threat to the innocent citizens of Iraq as well as to the world, including the United States.<sup>274</sup> American troops captured Hussein on December 13, 2003.<sup>275</sup> President Bush and his top officials relied on flawed intelligence, however; there were never any WMD in Iraq.<sup>276</sup> This revelation tarnished the United States' reputation abroad, thus weakening its power and legitimacy with its allies and enemies alike; for example, it breached the trust of the world's Muslims and impacted levels of international support for U.S. military operations in the Middle East.<sup>277</sup> For its enemies, the invasion of Iraq, based on false intelligence, provided fuel for stirring up more anti-American sentiment among terror groups and fodder for terror groups to use in their recruitment propaganda.<sup>278</sup>

In 2011, the world witnessed the "Arab Spring"—an uprising of democratically minded activists in countries throughout the Middle East seeking to overthrow oppressive regimes and replace them with democracies.<sup>279</sup> The movement began in Tunisia and spread to Syria, Yemen, Bahrain, Egypt, Jordan, and Saudi Arabia.<sup>280</sup> While this movement gave many in the United States and around the world hope of peace and democracy in the Middle East, that did not occur. Democracy failed to gain a strong foothold in the region and instead of democracies replacing oppressive regimes, the Arab Spring left

<sup>273</sup> See *Iraq and Weapons of Mass Destruction: National Security Archive Briefing Book No. 80*, NAT'L SEC. ARCHIVE (Dec. 20, 2002), <http://nsarchive.gwu.edu/NSAEBB/NSAEBB80/> [<https://perma.cc/QGN4-N48W>] (last updated Feb. 26, 2003).

<sup>274</sup> Esther Pan, *IRAQ: Justifying the War*, COUNCIL ON FOREIGN RELATIONS (Oct. 17, 2003), <http://www.cfr.org/iraq/iraq-justifying-war/p7689#p2> [<https://perma.cc/NCU9-TFQB>].

<sup>275</sup> See Yochi J. Dreazen et al., *U.S. Troops Capture Saddam Hussein: Dramatic Seizure Changes Reality from Baghdad to the White House*, WALL ST. J., Dec. 15, 2003, at A1.

<sup>276</sup> Kenneth M. Pollack, *Spies, Lies, and Weapons: What Went Wrong*, ATLANTIC (Jan./Feb. 2004), <http://www.theatlantic.com/magazine/archive/2004/01/spies-lies-and-weapons-what-went-wrong/302878/> [<https://perma.cc/XWL6-S42U>].

<sup>277</sup> Nicholas Burns, *Iraq War Damaged US Credibility*, BOS. GLOBE (Dec. 21, 2011), <https://www.bostonglobe.com/opinion/2011/12/21/iraq-war-damaged-credibility/CU9B64xgfdGGhzG8NTWqJL/story.html> [<https://perma.cc/8TKB-LAFY>].

<sup>278</sup> TOD LINDBERG & SUZANNE NOSSEL, THE PRINCETON PROJECT ON NAT'L SEC., REPORT OF THE WORKING GROUP ON ANTI-AMERICANISM 12 (2004), <https://www.princeton.edu/~ppns/conferences/reports/fall/AA.pdf> [<https://perma.cc/NPC5-9ACR>].

<sup>279</sup> See *Arab Spring*, SOURCEWATCH, [http://www.sourcewatch.org/index.php/Arab\\_Spring](http://www.sourcewatch.org/index.php/Arab_Spring) [<https://perma.cc/MRP3-VGTL>].

<sup>280</sup> *Id.*

the region in an unstable state.<sup>281</sup> Egypt tried but failed to adopt an electoral government.<sup>282</sup> Syria fell into a bloody civil war, in which 200,000 Syrians were killed by 2015.<sup>283</sup> Iran threatened nuclear action and Islamic extremists engaged in beheadings and crucifixions as it took control of much of Syria and Iraq.<sup>284</sup>

In short, the target of the U.S. “War on Terror” is a global uprising of radical Islamic groups, whose goal is the destruction of legitimate institutions.<sup>285</sup> The groups that make up the EITN share the common trait of being Islamic extremists, meaning they share an interpretation of Islam that is totalitarian in nature and supports the creation of a global Islamic state.<sup>286</sup> Islamic extremism is based on the EITN’s interpretation of Islam as an all-encompassing religious-political system.<sup>287</sup> Islamic extremists believe that a caliphate run under sharia law is the only valid form of government; thus, the EITN’s ultimate objective is the merger of mosque and state—a Muslim theocracy.<sup>288</sup>

The current state of world affairs means that American foreign policy must recalibrate its foreign policy and national security actions and decisions to meet the changed global environment; Islamic terrorism has created a new normal—“a seemingly permanent war that is fought in many locations, against many enemies, and in many ways.”<sup>289</sup> Moreover, America’s response to these challenges will show the world whether U.S. exceptionalism is real or just an illusion.<sup>290</sup> America’s staying power will be determined, in part, by its “soft power”—the United States’ cultural appeal and standing as a benevolent, rather than an aggressive, international power.<sup>291</sup>

The United States forcefully condemns the antipluralistic, pro-theocratic goals of the EITN. While it seeks to defeat the EITN, the United States also seeks to create or support regime change in countries such as Afghanistan, Syria,

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<sup>281</sup> HOOK & SPANIER, *supra* note 24, at xiii.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at xiv.

<sup>285</sup> John H. Johns, *Foreign Policy, National Security, and Nation Building*, 6 REGENT J. INT’L L. 313, 352 (2008).

<sup>286</sup> See U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, *supra* note 21, at 88.

<sup>287</sup> See *Islamist Extremism*, FARO PROJECT, <http://www.faroproject.org/islamist-extremism/> [<https://perma.cc/C2WV-F32F>].

<sup>288</sup> *Id.*

<sup>289</sup> HOOK & SPANIER, *supra* note 24, at 20.

<sup>290</sup> *Id.* at xviii.

<sup>291</sup> *Id.* at 2.

and Iraq.<sup>292</sup> These goals are related: If the United States is successful in defeating theocratic, nonstate terror groups like ISIS and Boko Haram,<sup>293</sup> the threat of these groups attacking the United States directly or radicalizing individuals to engage in “lone wolf” acts of violence will diminish. Successful regime changes in these countries—which would mean that those countries embrace and enact democratic principles and religious pluralism—will increase the United States’ national security for the same reasons. The United States is publicly vocal on both fronts—the fight to topple the EITN and the effort to build democracies.<sup>294</sup> The United States’ position on both fronts constitutes an important piece of my interest convergence argument, laid out in Part V below.

## 2. LGBT Civil Rights on the International Stage

A key component of the foreign policy and national security argument for LGBT civil rights in the United States is the position that the United States has taken vis-à-vis LGBT civil rights abroad. Because consistency is important for foreign policy legitimacy and national security, the United States must take a stand on the civil rights of LGBT Americans that is the same as the stand it takes on the civil rights of LGBT people abroad.

While many countries support LGBT equality, some continue to criminalize LGBT conduct and status and do so largely on the basis of religious beliefs. For example, in Nigeria, both Boko Haram (a nonstate actor) and the Nigerian government treat LGBT people with violence and discrimination.<sup>295</sup> In 2014, the Nigerian government passed a law that punishes—with a prison term—people who participate in same-sex marriage ceremonies or declare their same-sex relationships publicly.<sup>296</sup> That law also outlaws public gatherings of LGBT people.<sup>297</sup> Officials of the Nigerian government have tortured their own

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<sup>292</sup> See, e.g., Same Varayudej, *A Right to Democracy in International Law: Its Implications for Asia*, 12 ANN. SURV. INT’L & COMP. L. 1, 11–12 (2006).

<sup>293</sup> Boko Haram is a militant Islamist group; it means “Western education is forbidden.” *Boko Haram Fast Facts*, CNN (Oct. 31, 2016), <http://www.cnn.com/2014/06/09/world/boko-haram-fast-facts/> [<https://perma.cc/N7CV-E56V>].

<sup>294</sup> See, e.g., Gardiner Harris & Michael D. Shear, *Obama Says of Terrorist Threat: ‘We Will Overcome It’*, N.Y. TIMES (Dec. 6, 2015), [http://www.nytimes.com/2015/12/07/us/politics/president-obama-terrorism-threat-speech-oval-office.html?\\_r=0](http://www.nytimes.com/2015/12/07/us/politics/president-obama-terrorism-threat-speech-oval-office.html?_r=0) [<https://perma.cc/PMC8-5YBT>].

<sup>295</sup> See Trudy Ring, *New Jersey Rep Gets Blowback on Antigay Statements*, ADVOCATE (Nov. 17, 2015), <http://www.advocate.com/politics/politicians/2015/02/06/new-jersey-rep-gets-blowback-antigay-statements> [<https://perma.cc/88ST-ZBT7>].

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

citizens to force them to identify others who are LGBT.<sup>298</sup> Two gay men in Malawi were arrested and charged with public indecency, after announcing their marriage to each other, on the grounds that they “committed a crime against our culture, against our religion, and against our laws.”<sup>299</sup>

The regressive and violent treatment of LGBT people in some countries outside of the United States stands in stark contrast to the U.S. position on international LGBT civil rights. The United States has spoken very publicly in favor of LGBT civil rights internationally. For example, in 2011, President Obama issued an executive order—the Presidential Memorandum on International Initiatives to Advance the Human Rights of LGBTI Persons—declaring that LGBT rights are a top priority of the U.S. foreign policy agenda.<sup>300</sup> It directed federal departments and agencies to combat the criminalization of LGBT status or conduct abroad; protect vulnerable LGBT refugees or asylum seekers; enhance assistance to protect human rights and advance nondiscrimination policies for LGBT persons; and “help ensure swift and meaningful response[s] . . . to human rights [abuses] of LGBT persons abroad.”<sup>301</sup> In 2015, the State Department for the first time appointed a Special Envoy for the Human Rights of LGBT Persons.<sup>302</sup> Also in 2015, 125 members of Congress signed a letter to Secretary of State John Kerry encouraging him to begin “equal treatment for LGBT Foreign Service Officers.”<sup>303</sup>

Then, in April 2016, the Special Envoy reaffirmed that he and his State Department colleagues “continue to demonstrate our country’s unwavering commitment to advance the human rights of all people, including LGBTI people, not

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<sup>298</sup> *Id.*

<sup>299</sup> *Malawi Suspends Laws Against Homosexual Relationships*, BBC NEWS (Nov. 5, 2012), <http://www.bbc.com/news/world-africa-20209802> [<https://perma.cc/T7WJ-MKA6>].

<sup>300</sup> See Memorandum on International Initiatives to Advance the Human Rights of Lesbian, Gay, Bisexual, and Transgender Persons, 1 PUB. PAPERS 1524–26 (Dec. 6, 2011).

<sup>301</sup> *Id.*

<sup>302</sup> See *At the Top of the Daily Press Briefing, Randy Berry Remarks on Advancing the Rights of LGBTI Persons*, HUMANRIGHTS.GOV (Apr. 20, 2016), <http://www.humanrights.gov/dyn/04/at-the-top-of-the-daily-press-briefing-randy-berry-on-advancing-the-human-rights-of-lgbti-persons-globally/> [<https://perma.cc/UM8X-LDFU>].

<sup>303</sup> Press Release, Office of Nancy Pelosi, Democratic Leader, Pelosi Statement in Support of LGBT Equality in the U.S. Foreign Service (July 27, 2015), <http://www.democraticleader.gov/newsroom/pelosi-statement-in-support-of-lgbt-equality-in-the-u-s-foreign-service/> [<https://perma.cc/3EM4-76J3>] (“[W]e must lead the world in asserting that all people are created equal and should be treated with dignity. Foreign Service Officers who so ably and proudly represent our nation should be encouraged to serve wherever their expertise and language skills are needed. By supporting equality for LGBT FSOs and their families, we have an opportunity to demonstrate our values to the world.”).

just here at home but abroad as well.”<sup>304</sup> Additionally, the United States has strongly condemned anti-LGBT violence and legislation in foreign countries just as strongly as it has expressly supported international LGBT rights. In doing so, it has also touted the virtues of religious pluralism. For example, in 2009, in his Nobel Prize acceptance speech, President Obama stated: “I believe that peace is unstable where citizens are denied the right to speak freely or worship as they please; choose their own leaders or assemble without fear.”<sup>305</sup>

Then, in 2010, when Uganda passed a harsh anti-LGBT law that would institute the death penalty for LGBT people in some cases, the United States Congress—both Democrats and Republicans—issued a resolution condemning it.<sup>306</sup>

Moreover, in 2014, Secretary of State John Kerry addressed the United Nations, saying:

We have a moral obligation to speak up against marginalization and persecution of LGBT persons. We have a moral obligation to promote societies that are more just and more fair, more tolerant . . . [B]ut obviously, make no mistake, it happens to also be a strategic necessity. Greater protection of human rights we know, because we’ve seen it in country after country, leads to greater stability and greater prosperity not occasionally, but always.<sup>307</sup>

Additionally, the Special Envoy has noted that “we need more voices to stand against draconian legislation.”<sup>308</sup>

Also in 2014, Gambia passed an anti-LGBT law to impose a life sentence in prison for some homosexual acts.<sup>309</sup> In response, the State Department expressed its “dismay” about the law.<sup>310</sup> Then, in 2015, Gambia’s president promised “to slit the throats of gay men in his country”; Susan Rice, the U.S.

<sup>304</sup> *At the Top of the Daily Press Briefing, Randy Berry Remarks on Advancing the Rights of LGBTI Persons*, *supra* note 302.

<sup>305</sup> Barack H. Obama, *Nobel Lecture: A Just and Lasting Peace*, NOBELPRIZE.ORG (Dec. 10, 2009), [https://www.nobelprize.org/nobel\\_prizes/peace/laureates/2009/obama-lecture\\_en.html](https://www.nobelprize.org/nobel_prizes/peace/laureates/2009/obama-lecture_en.html) [<https://perma.cc/BA8R-6C2N>].

<sup>306</sup> See Chris Johnson, *U.S. Congress Moves Against Anti-gay Uganda Bill*, WASH. BLADE (Feb. 9, 2010), <http://www.washingtonblade.com/2010/02/09/u-s-congress-moves-against-anti-gay-uganda-bill/> [<https://perma.cc/7AHG-A2SZ>] (“Senators from across the ideological divide are expressing that this is a significant human rights issue and an issue that the U.S. government takes seriously.”).

<sup>307</sup> John Kerry, Sec’y of State, Remarks at a High-Level Dialogue on Combating Violence Targeting LGBT (Sept. 25, 2014), <https://2009-2017.state.gov/secretary/remarks/2014/09/232162.htm> [<https://perma.cc/7CPW-HDDS>].

<sup>308</sup> *Id.*

<sup>309</sup> See *The Gambia Passes Bill Imposing Life Sentences for Some Homosexual Acts*, GUARDIAN (Sept. 8, 2014), <https://www.theguardian.com/world/2014/sep/09/gambia-passes-bill-life-imprisonment-homosexual-acts> [<https://perma.cc/Z9AE-M8SP>].

<sup>310</sup> *State Department Condemns Gambia’s New Anti-gay Law*, LGBTQ NATION (Nov. 24, 2014), <http://www.lgbtqnation.com/2014/11/state-department-condemns-gambias-new-anti-gay-law/> [<https://perma.cc/7GB3-G2BP>].

National Security Advisor, responded to that remark with condemnation, stating it was “unconscionable.”<sup>311</sup>

As explained more fully below, the United States simply cannot maintain its foreign policy stature and legitimacy when its top diplomatic officials make sweeping statements about achieving and protecting LGBT equality everywhere, yet other government leaders express opposing stances by supporting anti-LGBT bills on American soil. Rather, the United States looks like a hypocrite, just as it did in World War I, World War II, and the Cold War.<sup>312</sup> Moreover, the United States cannot maintain its foreign policy stature and legitimacy when its top diplomatic officials make unqualified assertions about the importance of religious pluralism if religious pluralism is not operational in the United States. This is the crux of this article’s interest convergence argument.

#### IV. INTEREST CONVERGENCE: THE FOREIGN POLICY AND NATIONAL SECURITY ARGUMENTS FOR FORMAL EQUALITY FOR LGBT AMERICANS

This part brings together the United States’ approaches to foreign policy, its contemporary national security concerns, its position on LGBT civil rights abroad and at home, and the similarities between the EITN and the Religious Right to argue that there is a powerful opportunity for interest convergence to achieve formal equality for LGBT Americans. In doing so, it explains how full, formal equality for LGBT Americans is intimately connected with to U.S. foreign policy and national security interests, much like formal equality for African Americans was intimately connected to U.S. foreign policy and national security interests during the World Wars and the Cold War.

In it, I contend that courts and lawmakers must recognize this connection and act accordingly by (1) rejecting claims by for-profit businesses that such businesses should be exempt from antidiscrimination laws (the Antidiscrimination Question); (2) declaring unconstitutional the recent spate of explicitly anti-LGBT laws, like those in North Carolina and Mississippi; (3) passing a federal antidiscrimination statute that includes sexual orientation and gender identity; and (4) passing or amending antidiscrimination statutes to add sexual

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<sup>311</sup> Chris Johnson, *U.S. Slams Gambia President’s Anti-gay Comments*, WASH. BLADE (May 16, 2015), <http://www.washingtonblade.com/2015/05/16/susan-rice-condemns-gambia-presidents-anti-gay-comments/> [<https://perma.cc/RMU7-X3B2>].

<sup>312</sup> See *infra* Section II.A.

orientation and gender identity protections in states that currently lack those protections.

### A. *EITN and the Religious Right: Birds of a Feather*

The argument that American LGBT civil rights is a foreign policy and national security priority is grounded in the similarity between the EITN and the Religious Right.<sup>313</sup> Both seek to create a society in which their own religious beliefs rise above any civil rule of law.<sup>314</sup> The EITN explicitly seeks a Muslim theocracy,<sup>315</sup> while the Religious Right's quest is for an anti-Establishment regime in which its religious beliefs are favored over all others and above the civil law. I have laid out these parallel goals in greater detail above;<sup>316</sup> this part supplements the illustration of those parallel goals with specific examples of the Religious Right's anti-Establishment vision and the EITN's theocratic vision—both of which rely on religion to justify anti-LGBT actions.

Part III laid out in detail the quasi-theocratic goals of the Religious Right. Recently, a federal court also recognized that the Religious Right's anti-LGBT efforts are anti-Establishment. In *Barber v. Bryant*, the case challenging Mississippi's HB 1523, the court held that the statute violated the Establishment Clause

because persons who hold contrary religious beliefs are unprotected—the State has put its thumb on the scale to favor some religious beliefs over others. Showing such favor tells “nonadherents that they are outsiders, not full members of the political community, and . . . adherents that they are insiders, favored members of the political community.”<sup>317</sup>

It is my hope that courts in future cases will continue to recognize and denounce the anti-Establishment nature of the

<sup>313</sup> Clearly, the two groups have very different tactics. While the EITN resorts to violence, the Religious Right's tactic is nonviolent; it wages its fight in legislatures and courtrooms rather than in outright violence. The different tactics, however, do not change the analysis regarding interest convergence; the impact of U.S. hypocrisy regarding religious freedom on its global legitimacy is the same notwithstanding the different tactics.

<sup>314</sup> See Rev. Dr. John C. Dorhauer, *The Religious Right and the Erosion of Religious Liberty*, HUFFINGTON POST (Jan. 14, 2016), [http://www.huffingtonpost.com/rev-dr-john-c-dorhauer/the-religious-right-and-t\\_b\\_8977922.html](http://www.huffingtonpost.com/rev-dr-john-c-dorhauer/the-religious-right-and-t_b_8977922.html) [<https://perma.cc/SJP6-VEX8>]; see also John Graham, *Who Joins ISIS and Why?*, HUFFINGTON POST (Dec. 29, 2015), [http://www.huffingtonpost.com/john-graham/who-joins-isis-and-why\\_b\\_8881810.html](http://www.huffingtonpost.com/john-graham/who-joins-isis-and-why_b_8881810.html) [<https://perma.cc/83B4-BHKT>].

<sup>315</sup> Dorhauer, *supra* note 314; Graham, *supra* note 314.

<sup>316</sup> See *supra* Section III.D.

<sup>317</sup> *Barber v. Bryant*, 193 F. Supp. 3d 677, 688 (S.D. Miss. 2016) (omission in original) (quoting *Santa Fe Indep. Sch. Dist. V. Doe*, 530 U.S. 290, 309–10 (2000)).

Religious Right's litigation and legislative strategies, for it is this public recognition of the anti-Establishment nature of the Religious Right's agenda that highlights the possibility for interest convergence.

Another example of the similarities between the Religious Right's anti-Establishment goal and the EITN's goal of a Muslim caliphate occurred during a Republican presidential debate in 2016.<sup>318</sup> In that debate, then-candidate Chris Christie was asked a question about Kim Davis<sup>319</sup>— the elected county clerk in Kentucky who refused to issue marriage licenses (which was part of her job) to same-sex couples because, in her words:

“To affix my name . . . on a certificate that authorizes marriage that conflicts with God's definition of marriage as a union between one man and one woman violates my deeply held religious convictions and conscience” . . . . “For me, this would be an act of disobedience to my God.”<sup>320</sup>

The following exchange occurred between Christie and the debate moderator:

“I never said that Ms. Davis should either lose her job or that she had to do it, but what I did say was that the person who came in for the license needed to get it,” Christie added.

. . . .

“Here's the problem with what's going on around the world: The radical Islamic jihadists, what they want to do is impose their faith upon each and every one of us, and the reason why this war against them is so important is that very basis of religious liberty,” . . . .

They want everyone in this country to follow their religious beliefs the way they do. They do not want us to exercise religious liberty. That's why as commander-in-chief, I will take on ISIS, not only because it keeps us safe, but because it allows us to absolutely conduct our religious affairs that way we find in our heart and our souls.”<sup>321</sup>

When considered through the lens proposed in this article, this seeming non sequitur becomes a clear statement of the similarities between the quasi-theocratic goal of the Religious

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<sup>318</sup> David Badash, *Chris Christie Turns Kim Davis Question into Answer About ISIS (Video)*, NEW CIVIL RIGHTS MOVEMENT (Jan. 29, 2016), [http://www.thenewcivilrightsmovement.com/davidbadash/chris\\_christie\\_turns\\_kim\\_davis\\_question\\_into\\_answer\\_about\\_isis\\_video](http://www.thenewcivilrightsmovement.com/davidbadash/chris_christie_turns_kim_davis_question_into_answer_about_isis_video) [https://perma.cc/R7C7-HN44].

<sup>319</sup> *Id.*

<sup>320</sup> Emma Margolin, *Kim Davis Won't Grant Authority to Issue Marriage Licenses*, MSNBC NEWS (Sept. 14, 2015), <http://www.msnbc.com/msnbc/kim-davis-wont-grant-authority-issue-marriage-licenses> [https://perma.cc/8GLR-Z3L7].

<sup>321</sup> Badash, *supra* note 318.



Right and the expressly theocratic goal of the EITN. Christie recognized that the EITN seeks a theocracy, and resoundingly rejected that goal as anti-American and as a threat to all Americans.<sup>322</sup> He did not, however, acknowledge that what Kim Davis sought was an anti-Establishment, quasi-theocracy similar to ISIS's goal. Just like ISIS, Davis does not want people of any other religions to exercise their religious liberties.<sup>323</sup> As the EITN seeks to impose its theocratic goals, so too does Davis—both want a world in which civil laws are subservient to their particular religious beliefs. It does not take strong powers of deduction to reach that conclusion; the Religious Right was directly behind Davis's actions and financed her legal cases.<sup>324</sup> Adding fuel to the EITN's anti-American fire by our own actions created a national security threat of our own making. Second, taking hypocritical positions on religious freedom abroad and at home—which Christie did in the debate—impairs the efficacy of our foreign policy agenda, with regard to our allies and our foes alike.<sup>325</sup>

Once the Religious Right's end-goal is uncovered and revealed for all to see, there is little difficulty in making the argument that the Religious Right and the EITN are of a similar ilk. EITN is explicit in its quest for a caliphate—a Muslim theocracy in the Middle East, North Africa, and other areas of the world.<sup>326</sup> The Religious Right cloaks its quest for an anti-Establishment, quasi-theocratic regime with the seemingly neutral garb of religious freedom, but that garb is easily pulled off to reveal the true goal of the Religious Right.<sup>327</sup>

The fact that the EITN and the Religious Right share similar theocratic and quasi-theocratic sensibilities should put those in the U.S. foreign policy and national securities

<sup>322</sup> *See id.*

<sup>323</sup> *See, e.g.,* Jonathan Davis, *Kim Davis, Religious Liberty, and Why Many Christians Are Getting It Wrong*, BAPTIST NEWS GLOB. (Sept. 9, 2015), <https://baptistnews.com/article/kim-davis-religious-liberty-and-why-many-christians-are-getting-it-wrong/#.WDZcPPkrLIU> [<https://perma.cc/7CHX-4X7X>].

<sup>324</sup> Brian Brown, *Make a Contribution to Help Kim Davis*, NAT'L ORG. OF MARRIAGE (Sept. 7, 2015), <http://www.nomblog.com/40701/> [<https://perma.cc/58BJ-VXQ3>].

<sup>325</sup> At least one of our allies has taken action against the United States based on the recent spate of anti-LGBT legislation. In April of 2016, Great Britain issued a travel warning to its LGBT citizens, warning them to be aware of the North Carolina "bathroom bill" and the Mississippi bill that permits businesses to discriminate against LGBT customers. *See* Peter Holley, *Britain Issues Warning for LGBT Travelers Visiting North Carolina and Mississippi*, WASH. POST (Apr. 20, 2016), <https://www.washingtonpost.com/news/worldviews/wp/2016/04/20/britain-issues-warning-for-lgbt-travelers-visiting-north-carolina-and-mississippi/> [<https://perma.cc/QD7K-GDNR>].

<sup>326</sup> *See* Graeme Wood, *What ISIS Really Wants*, ATLANTIC (Mar. 2015), <http://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980/> [<https://perma.cc/3ASU-M99R>].

<sup>327</sup> *See generally* CLARKSON, *supra* note 15, at 27.

communities in a state of high alert. The concern that should be apparent to these communities is that the positions that the United States takes concerning the EITN can be turned back toward the United States itself. If the United States is seen as tolerating the Religious Right's quest for a theocratic-like America, while it is at the same time condemning the EITN's quest for the same goal, the United States is an easy target for being labeled a hypocrite by both our allies and our enemies. Allies may be less enthusiastic about providing financial support, moral support, and human-capital support for U.S. democracy building and anti-terror efforts. It is hypocrisy in relation to our enemies, however, that is the most dangerous and should give policymakers the most pause. U.S. hypocrisy on religious freedom provides fuel for terrorist groups to build their anti-American narrative and thus recruit more foot soldiers for their war of terror—recruitment of disillusioned American citizens, as well as non-Americans around the world. Because the United States condemns the EITN's theocratic end game, it must similarly condemn the Religious Right's anti-Establishment end game. Failing to do so puts the United States at risk of losing its foreign policy credibility and of diminishing its national security.

Given their militant religious beliefs,<sup>328</sup> it is not a surprise that both the EITN and the Religious Right are expressly anti-LGBT, though their opposition takes different forms. As described above, the Religious Right expresses its opposition to LGBT people and LGBT civil rights by invoking religion as a shield from complying with state antidiscrimination laws, and, more recently, by introducing anti-Establishment legislation that explicitly targets LGBT people and same-sex marriage by seeking to elevate conservative Christian beliefs over the rule of law.<sup>329</sup>

The EITN expresses its opposition to LGBT people and LGBT civil rights more violently. Under ISIS's extremist interpretation of Islam, homosexuality is considered an offense punishable by death.<sup>330</sup> For example, ISIS has murdered men—and boys as young as fifteen—suspected of being gay by

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<sup>328</sup> See, e.g., Kimberly J. Cook, *Abortion, Capital Punishment, and the Politics of "God's Will"*, 9 WM. & MARY BILL RTS. J. 105, 117 (2000).

<sup>329</sup> See, e.g., HB 2, 2016 Gen. Assemb., Extra Sess. (N.C. 2016); HB 1523, 2016 Leg., Reg. Sess. (Miss. 2016).

<sup>330</sup> See Justin Wm. Moyer, *Don't Forget: The Islamic State Is Also Homophobic*, WASH. POST (Sept. 19, 2014), <https://www.washingtonpost.com/news/morning-mix/wp/2014/09/19/dont-forget-the-islamic-state-is-also-homophobic/> [<https://perma.cc/RfZ6-QSSG>].

throwing them from tall buildings.<sup>331</sup> They have also publicly executed gay men.<sup>332</sup> In fact, in 2015, in recognition of ISIS's brutality toward LGBT people, the United Nations Security Council held its first ever meeting to address what it called the "barbaric treatment" of LGBT people by ISIS.<sup>333</sup> Moreover, Iraqi and Syrian courts have issued sentences of stoning, pushing men off of tall buildings, death by firing squad, and death by beheading to punish homosexuality.<sup>334</sup> Lesbians and transgender people in Iraq and Syria have been raped and killed.<sup>335</sup>

Despite these differences, there is still compelling evidence that the EITN and Religious Right are similar in two critical ways that support the interest convergence argument: both groups seek to elevate their religious beliefs above the rule of law, and both groups' religious beliefs are squarely anti-LGBT, as are their anti-LGBT actions—though in different ways.<sup>336</sup> Because they are so similar, the United States must oppose their goals or risk being deemed inconsistent and hypocritical by the international community.

When it comes to condemning the EITN for any of its actions, including its anti-LGBT agenda, the United States is limited to public condemnations and, in some limited instances, the use of military force.<sup>337</sup> The foreign policy and national security communities have many more opportunities to meaningfully condemn and contest the Religious Right's attempts to gain an anti-Establishment foothold in the United States. Specifically, these communities can file amicus briefs in litigation concerning the Antidiscrimination Question and the new anti-LGBT laws, and can lobby state legislatures and Congress about the connection between LGBT civil rights in

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<sup>331</sup> See Tom Wyke & Ollie Gillman, *ISIS Throw 15-Year-Old Boy Off a Roof for Being Gay . . . But the Terror Chief Who Raped Him Is Let Off*, DAILYMAIL (Jan. 3, 2016), <http://www.dailymail.co.uk/news/article-3382990/ISIS-throw-15-year-old-teenager-roof-gay-terror-chief-raped-let-off.html> [https://perma.cc/7XT8-4ZW8].

<sup>332</sup> *Id.*

<sup>333</sup> See Tim Macfarlan, *Stoned to Death for Adultery: ISIS Crush Skull of a Man Accused of Having an Affair as UN Claims Group Have Killed 'At Least' 30 People for Being Gay*, DAILYMAIL (Aug. 25, 2015), <http://www.dailymail.co.uk/news/article-3210053/Stoned-death-adultery-ISIS-crush-skull-man-accused-having-affair-claims-group-killed-30-people-gay.html> [https://perma.cc/SB8M-38JC].

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> For example, while the EITN expresses its anti-LGBT beliefs through violence, see, e.g., Moyer, *supra* note 330, the Religious Right expresses its anti-LGBT beliefs through lobbying and anti-LGBT legislative efforts, see, e.g., HB 2, 2016 Gen. Assemb., Extra Sess. (N.C. 2016); HB 1523, 2016 Leg., Reg. Sess. (Miss. 2016).

<sup>337</sup> See Kathleen Hennessey & Michael A. Memoli, *Obama Asks Congress to Back Fight Against Islamic State, but Is Vague on Limits*, L.A. TIMES (Feb. 11, 2015), <http://www.latimes.com/nation/politics/politicsnow/la-pn-obama-isis-20150211-story.html> [https://perma.cc/N6GM-FKN2].

the United States and American foreign policy and national security interests. In addition, the lawmakers in those communities can introduce LGBT civil rights legislation or vote in favor of such legislation. As explained below, this foreign policy and national security interest in American LGBT civil rights is an example of Bell's interest convergence in action and creates an opportunity for formal equality for LGBT Americans—an equality that will serve the converging interests Bell insists are necessary for civil rights movement victories.

*B. Interest Convergence: Why the LGBT Community and the National Security and Foreign Policy Communities Want to Defeat the Religious Right, but for Different Reasons*

Interest convergence is present in a powerful way between the American foreign policy and national security communities and the American LGBT civil rights community. This interest convergence should be leveraged to stop the Religious Right's efforts to roll back and block civil rights for LGBT Americans, as well as to pass affirmatively pro-LGBT laws and policies.

LGBT civil rights advocates have an interest in defeating the Religious Right's efforts at creating an anti-Establishment quasi-theocracy in America because these efforts are aimed at denying protections from discrimination or evading laws that prohibit discrimination based on SOGI. These actions seek to deny LGBT Americans basic civil rights such as holding a job, securing housing or credit, or being able to fully participate in the nation's economy.<sup>338</sup> In seeking to deny these basic rights, the Religious Right is not only seeking to inflict legal harms, but also to dehumanize LGBT people and inflict dignitary harms. In sum, the LGBT community's interest in the rhetoric and actions of the Religious Right is rights-based, dignity-based, and morality-based.

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<sup>338</sup> See, e.g., *In re Klein*, Nos. 44-14, 45-14, 2015 WL 4503460, at \*19 (Or. Bureau of Labor & Indus. July 2, 2015) (noting that the denial of a wedding cake to a same-sex couple is more than the mere denial of a service; rather "[i]t is the epitome of being told there are places you cannot go, things you cannot do . . . or be. Respondent's conduct was a clear and direct statement that [plaintiffs] lacked an identity worthy of being recognized. The denial of these basic freedoms to which all are entitled devalues the human condition of the individual, and in doing so, devalues the humanity of us all."); *id.* (holding that "[w]ithin Oregon's public accommodations law is the basic principle of human decency that every person, regardless of their sexual orientation, has the freedom to fully participate in society. [That freedom includes] [t]he ability to enter public places, to shop, to dine, to move about unfettered by bigotry."); *id.* (holding that "to deny any services to people because of their protected class, would be tantamount to allowing legal separation of people based on their sexual orientation from at least some portion of the public marketplace").

The foreign policy and national security communities also have an interest in the anti-LGBT narrative and agenda of the Religious Right. But that interest is not tied to rights-based or morality-based concerns; it is tied directly to the foreign policy and national security risks that will inevitably accrue if the United States is seen as supporting the creation of a quasi-theocracy in the United States. The United States was the subject of immense international criticism—and loss of credibility—during the Bush presidency based on that administration's use of “enhanced interrogation techniques” such as water-boarding, and the creation of a detention center at Guantanamo Bay, Cuba, which opened in 2002 as a prison for non-American, Muslim “unlawful enemy combatants.”<sup>339</sup> Upon taking office, President Obama indicated a desire to “re-engage with the international community as a matter of legal compliance (e.g., outlawing the use of so-called ‘enhanced interrogation techniques’), as good foreign policy (i.e., restoring American’s moral authority in the world) and as a matter of restoring the rule of law.”<sup>340</sup> The United States will not be in a position to achieve the second two of these goals if it allows discrimination in the name of religion: “America’s standing in the world and reasserting the primacy of the rule of law vis-à-vis counterterrorism policies cannot be achieved if there is significant evidence that the United States is actually undermining those principles.”<sup>341</sup>

The State Department has noted that the goal of the nonstate actors of the EITN is the destruction of “religious dogma.”<sup>342</sup> The same can be said of the Religious Right in the United States—it has set its sights on destroying the religiously pluralistic society envisioned by the Founders and replacing it with a quasi-theocratic regime where conservative Christian beliefs replace the rule of law in America.<sup>343</sup>

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<sup>339</sup> Jeannette L. Nolen, *Guantánamo Bay Detention Camp*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Guantanamo-Bay-detention-camp> [<https://perma.cc/VE/E6-6U6J>]; see also Stephanie M. Weinstein, *A Needed Image Makeover: Interest Convergence and the United States’ War on Terror*, 11 ROGER WILLIAMS U. L. REV. 403, 414–15 (2006).

<sup>340</sup> See Sudha Setty, *Targeted Killings and the Interest Convergence Dilemma*, 36 W. NEW ENG. L. REV. 169, 182 (2014) (footnotes omitted).

<sup>341</sup> *Id.* at 184 (“These narratives, reports, photos, and video [of U.S. drone strikes in Yemen and Pakistan killing innocent civilians] only serve to undermine efforts to engender trust in the United States as a moral leader concerned about the rule of law and human rights, and instead have led to terrorist organizations using evidence of civilian casualties as a recruiting tool.”).

<sup>342</sup> U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, INTERNATIONAL RELIGIOUS FREEDOM REPORT FOR 2014, at 2 (2014).

<sup>343</sup> See CLARKSON, *supra* note 15, at v.

Similar sensibilities—though admittedly very different approaches to operationalize such sensibilities—define the Religious Right. The Religious Right seeks to silence the believers of any faith that deviates from its own interpretation of Christianity. It seeks to replace the rule of law with the word of its own God. And it seeks to forcibly displace, at least economically, LGBT Americans by allowing Christian business owners to deny goods and services to LGBT Americans and by prohibiting the passage of antidiscrimination laws based on SOGI.<sup>344</sup>

President Obama recognized the essential connection between religious pluralism and national security as recently as July 15, 2016. He stated that groups like ISIS have “hateful ideologies that twist and distort Islam.”<sup>345</sup> He continued that the War on Terror will be won if we stay true to the American “values of pluralism, the rule of law, diversity” and the freedom of religion: “We cannot let ourselves be divided by religion, because that is exactly what the terrorists want. *We should never do their work for them.* . . . [I]n the United States, our freedoms, including *freedom of religion, help keep [us] strong and safe*, and we have to be vigilant to defend our security and our freedoms.”<sup>346</sup>

Most nation-states want their foreign policies to be viewed as legitimate; they thus care about what other nation-states around the world think about them.<sup>347</sup> To implement these foreign policy priorities requires, among other things, moral authority and legitimacy.

To acquire and keep this authority and legitimacy, the United States must “walk the walk” on the values it espouses, not just “talk the talk.” To win the War on Terror will take more than brute military force;<sup>348</sup> it will also require the United States to use its soft power, namely the attraction of the values and freedoms guaranteed by the United States. The United States takes the position that religious pluralism is a fundamental building block of a free, democratic society, where

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<sup>344</sup> “[T]o allow Respondents, a for profit business, to deny any services to people because of their protected class, would be tantamount to allowing legal separation of people based on their sexual orientation from at least some portion of the public marketplace.” *In re Klein*, 2015 WL 4503460, at \*19 (Or. Bureau of Labor & Indus. July 2, 2015).

<sup>345</sup> *President Obama Remarks on Terrorist Attack in Nice, France*, C-SPAN (July 15, 2016), <https://www.c-span.org/video/?412815-1/president-obama-addresses-diplomatic-corps-wake-terrorist-attack-nice>.

<sup>346</sup> *Id.* (emphasis added).

<sup>347</sup> FOREIGN POLICY: THEORIES, ACTORS, CASES, *supra* note 36, at 228.

<sup>348</sup> Johns, *supra* note 285, at 352.

the rule of law carries the day.<sup>349</sup> To meaningfully spread that message and effect real change in regions of the world where freedom and democracy do not currently exist, America must ensure that its own system is one in which religious pluralism and the rule of law reign supreme. To do that, American lawmakers and policymakers must affirmatively reject the Religious Right's campaign to diminish the rule of law with theocratic-like zones of exemptions.

Part and parcel to supporting the religious pluralism and rule of law at home and abroad is ensuring civil rights for all Americans, including LGBT Americans. Thus, LGBT civil rights are intimately connected to religious pluralism. United States' officials from all branches of government have spoken at home and abroad about the importance of full equality for LGBT people, and have condemned anti-LGBT actions abroad numerous times. To meaningfully spread the message of full equality for LGBT people, America must ensure that its own system is one in which LGBT people are fully equal; any other result would appear hypocritical. The United States will not be successful in "winning hearts and minds" if it takes one stance on anti-LGBT laws based on religious beliefs that are passed in other countries but takes another stance—one that permits anti-Establishment, conservative-Christian-favoring exceptions to antidiscrimination laws—here in the United States.

### 1. Concrete Examples of American Hypocrisy in Action

The risk of hypocrisy—of losing moral authority—on both the religious pluralism front and the LGBT civil rights front makes these issues not only a foreign policy imperative but also a national security imperative. Terror groups will seize on any U.S. weakness it sees, and hypocrisy—about religious pluralism and LGBT civil rights—is an easy target.<sup>350</sup> "Do as I

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<sup>349</sup> See generally President Obama Remarks on Terrorist Attack in Nice, France, *supra* note 345 ("We will win this fight by staying true to our values, values of pluralism, rule of law, diversity and freedoms like the freedom of religion, freedom of speech and assembly, the very freedoms that the people of Nice were celebrating last night on Bastille Day.").

<sup>350</sup> See generally Ikechi Mgbefji, *The Bearded Bandit, the Outlaw Cop, and the Naked Emperor: Towards a North-South (De)construction of the Texts and Contexts of International Law's (Dis)engagement with Terrorism*, 43 OSGOODE HALL L.J. 105, 125 (2005) ("While the United States denounced 'Muslim extremism,' they knowingly fomented the emergence of an 'Islamic insurgency' as a weapon of policy against the Soviets. . . . The hypocrisy is staggering. Such a hypocritical construction of terrorism brings international law to ridicule and disrepute. How can international law be a vehicle or instrument in the war against terror when its canons are inconsistently applied in a brazenly cynical manner?").

say, not as I do”<sup>351</sup> is a weak approach to foreign policy as well as a national security risk. That damage could manifest in two ways. First, ISIS and others within the EITN will jump on this American hypocrisy, call it out, and use it to recruit new foot soldiers for its quest for a caliphate.<sup>352</sup> If the Religious Right continues to prevail in their efforts to roll back LGBT civil rights, which is part and parcel of its quest to elevate its faith over other faiths and over civil laws, we should expect ISIS and others in the EITN to continue to seize on such events for their own gain.

These are the different interests of the LGBT civil rights community and the foreign policy and national security communities in formal equality for LGBT Americans. How do these interests converge? These interests converge when lawmakers and policymakers adopt the narrative of LGBT rights as inextricably connected to foreign policy interests and America’s national security. LGBT civil rights activists have attempted to pass laws protecting LGBT Americans for decades, and have had only limited success.<sup>353</sup> They need the buy-in of other interest holders to achieve full, formal equality; the foreign policy and national security interests in LGBT equality is the hook that can provide the interest convergence necessary to achieve equality.

At this moment in our history, there is immense political pressure for members of Congress and state lawmakers to be “hawkish” on matters of U.S. foreign policy and national security; to be seen otherwise is to be considered “soft on terrorism”—a political liability.<sup>354</sup> The interests of the foreign

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<sup>351</sup> *Do as I Say, Not as I Do*, FREE DICTIONARY BY FARLEX, <http://idioms.thefreedictionary.com/Do+as+I+say,+not+as+I+do> [<https://perma.cc/NPA9-WFQB>].

<sup>352</sup> The use that ISIS and other groups like it could make of the American hypocrisy would be this: The United States is the global leader trying to stop our holy war for a Muslim caliphate; it decries and condemns our movement because it purports to abhor theocracies. Yet, the United States is allowing the creation of a theocracy within its own borders. Its courts are finding that one kind of religious believer—Christians—are able to pick and choose what laws they want to follow. And state legislators are passing laws that allow Christians to discriminate against LGBT people. And the national Congress is doing the same. The United States says it abhors theocracy and supports LGBT civil rights, and uses that argument as its basis for the War on Terror against us, but what the United States is really saying is that it abhors a Muslim theocracy—the caliphate—because it is embracing a Christian theocracy at home. And it must not be true that the United States supports LGBT civil rights at home or abroad because it is allowing the formation of a Christian theocratic state that does not have to recognize LGBT civil rights.

<sup>353</sup> See, e.g., Sarah M. Stephens, *What Happens Next? Will Protection Against Gender Identity and Sexual Orientation Workplace Discrimination Expand During President Obama’s Second Term?*, 19 WASH. & LEE J. CIV. RTS. & SOC. JUST. 365, 382–83 (2013) (stating that while the Employment Non-Discrimination Act was first introduced in 1994 and has not yet passed, various versions of legislation seeking to protect against sexual orientation discrimination in employment have been introduced in Congress since the 1970s).

<sup>354</sup> See Setty, *supra* note 340, at 173–74.



policy and national security communities in LGBT civil rights is an opportunity for “[p]olitical interest convergence,” which “occurs when different political groups aggregate to form an issue-specific coalition that is large enough to effect serious policy change.”<sup>355</sup> For many lawmakers, such as most Republican lawmakers and those from conservative states, affirmative support for LGBT civil rights legislation is a political liability.<sup>356</sup> If these lawmakers articulate the foreign policy and national security interests that will be served by passage of an Employment Nondiscrimination Act (ENDA) and similar state-level antidiscrimination laws, however, they will serve their own political interest of appearing “tough on terror” and hawkish in the foreign policy and national security fronts. Put another way, focusing on the very narrow and specific place where the interests converge—where LGBT civil rights in the United States overlap with U.S. foreign policy and national security interests and imperatives—will allow for “the achievement of political victories without the vulnerability of being labeled ‘soft on terror’” and is a way “of negotiating otherwise precarious political realities.”<sup>357</sup>

The recent massacre of forty-nine patrons of a gay bar in Orlando, Florida by a shooter who pledged allegiance to ISIS moments before the attack offers a prime example of an opportunity to leverage this political interest convergence.<sup>358</sup> This event was one in a recent trend in the United States of “lone wolf” attacks—attacks by individuals living in the United States who have been radicalized by ISIS’s call for an extremist Muslim theocracy.<sup>359</sup>

Many Republicans, traditionally aligned with the Religious Right and often in support of religious exemptions to antidiscrimination laws for for-profit business, expressed outrage and sadness over the loss of life, yet none of them

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<sup>355</sup> *Id.* at 174.

<sup>356</sup> See, e.g., Cristina Marcos, *Chaos in House After GOP Votes Down LGBT Measure*, THE HILL (May 19, 2016), <http://thehill.com/blogs/floor-action/house/280542-dems-cry-foul-after-house-gop-votes-down-lgbt-measure> [<https://perma.cc/HU3X-7VGP>].

<sup>357</sup> Setty, *supra* note 340, at 190; see also Setty, *supra* note 59 (“Lawmakers often will not act on the basis of civil liberties concerns, but will implement rights-protective measures only because those measures serve another interest more palatable to mainstream constituencies.”).

<sup>358</sup> Ralph Ellis et al., *Orlando Shooting: 49 Killed, Shooter Pledged ISIS Allegiance*, CNN (June 13, 2016), <http://www.cnn.com/2016/06/12/us/orlando-nightclub-shooting/> [<https://perma.cc/CR99-7BHJ>].

<sup>359</sup> See Katie Worth, *Lone Wolf Attacks Are Becoming More Common—and More Deadly*, FRONTLINE (July 14, 2016), <http://www.pbs.org/wgbh/frontline/article/lone-wolf-attacks-are-becoming-more-common-and-more-deadly/> [<https://perma.cc/TVKK-ZPZS>].

connected the dots between LGBT civil rights and terrorism.<sup>360</sup> None of them mentioned that, because Florida does not protect LGBT people from discrimination, any of the LGBT patrons wounded in the attack could be fired from their job upon their release from the hospital, simply because of their sexual orientation, if any of their bosses learned of their sexual orientation through news of the attack and did not approve of it based on their religious beliefs.<sup>361</sup> Moreover, any of the LGBT patrons who were wounded could be denied medical care, based simply on their sexual orientation, due to the religious beliefs of the medical providers.<sup>362</sup> Similarly, if any of the surviving LGBT patrons sought goods and services for their same-sex wedding, those goods and services could be denied, again, simply because of their sexual orientation and the business owners' religious beliefs about same-sex marriage. Yet there was no national conversation about these connections. The United States condemns ISIS and its anti-LGBT agenda and also fears ISIS because of the risk of terrorism on American soil. All lawmakers should see these connections. All lawmakers should have spoken out in the days following the Orlando attack in support of LGBT civil rights, and in so doing, articulated that providing such equality and protections to LGBT Americans served the United States' foreign policy and national security interests. Orlando was a missed opportunity to leverage the interest convergence.

## 2. Recommendations for Operationalizing the Interest Convergence

How should those in power in the United States foreign policy and national security communities leverage their interests to ensure LGBT civil rights? What are the concrete steps that should be taken? To avoid duplicity and hypocrisy, American lawmakers and policymakers should proceed on two fronts, the judicial and the legislative, both of which are aimed at stopping the Religious Right's march toward an American theocracy. First, judges deciding cases that present the Antidiscrimination Question should continue to hold that the state's antidiscrimination statute trumps the purported religious

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<sup>360</sup> See Emma Green, *The Politics of Mass Murder*, ATLANTIC (June 13, 2016), <http://www.theatlantic.com/politics/archive/2016/06/orlando-political-reactions-homophobia-gun-rights-extremism/486752/> [<https://perma.cc/DD6B-WT9C>].

<sup>361</sup> See, e.g., *id.*; see also *Discrimination*, EQUALITY FLA. ACTION, INC., <http://www.eqfl.org/Discrimination> [<https://perma.cc/3MUB-T8BQ>].

<sup>362</sup> See *Discrimination*, *supra* note 361.

freedom of the for-profit business seeking an exemption from that antidiscrimination statute; neither the state RFRA nor the First Amendment permits for-profit businesses to be exempt from antidiscrimination laws.<sup>363</sup> To hold otherwise would create a pathway for the Religious Right's quest for a theocratic state. In addition, if and when the recent rash of anti-LGBT "bathroom bills" and other LGBT discrimination-approving bills—like those in North Carolina and Mississippi—are challenged in court, courts should strike them down; they are unconstitutional under the Due Process and Equal Protection Clauses, and the Supreme Court cases construing those clauses vis-à-vis LGBT people, as well as the Establishment Clause.<sup>364</sup>

Second, those states that do not have an antidiscrimination statute prohibiting discrimination based on SOGI should adopt one. So too should the U.S. Congress pass the Equality Act, which was introduced in 2015 and which protects against discrimination based on SOGI in "employment, housing, access to public places, federal funding, credit, education and jury service."<sup>365</sup> While passage of these laws have proven difficult in the past, that difficulty was based almost entirely on conservative lawmakers' fears of being perceived by their constituents as too liberal (and thus putting themselves in danger of losing their job in a reelection race) or as failing to align their voting with the interests of the Christian faith (couched as "religious freedom").<sup>366</sup> If the foreign policy and national security interests laid out herein are articulated as the interest being promoted and protected by passage of an LGBT civil rights law, however, then these lawmakers have "cover." Put another way, lawmakers reluctant to vote on LGBT antidiscrimination laws for fear of being a supporter of the "gay agenda" can feel empowered to do so when the reasons are "foreign policy" and "national security."<sup>367</sup>

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<sup>363</sup> See Velte, *supra* note 13, at 8.

<sup>364</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015); *United States v. Windsor*, 133 S. Ct. 2675, 2693–95 (2013); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Romer v. Evans*, 517 U.S. 620, 635 (1996).

<sup>365</sup> See *Why the Equality Act?*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/why-the-equality-act> [<https://perma.cc/3744-S4GJ>].

<sup>366</sup> See generally Green, *supra* note 360 ("But faced with untangling the many layers of the attack—that it happened at a gay bar on its Latin dance night; that the killer had allegedly made a pledge to ISIS; that . . . he used an assault rifle, and chose to execute his attack during the month of both gay-pride celebrations and Ramadan—political leaders stood apart, seemingly poised for the policy fights that are bound to come in the days and weeks to come. Among Republicans and other conservative leaders, few specifically mentioned the fact the attacks happened at a gay club, nor did they express solidarity with the gay community.").

<sup>367</sup> Similarly, lawmakers who now feel compelled to vote for bills that are anti-LGBT, like the North Carolina and Mississippi bills, can feel empowered to vote

For both groups—LGBT Americans and the foreign policy and national security community as a whole—the legal and normative stakes presented by the Religious Right are high. The choice is between true religious pluralism and a theocratic-like supremacism of the Religious Right’s “own religious beliefs inscribed in law.”<sup>368</sup> The dangers presented by the Religious Right—to LGBT Americans and the United States’ foreign policy and national security interests—can be minimized, if not entirely quashed, if lawmakers and policymakers recognize *their* interests in LGBT civil rights and religious pluralism. This is the interest convergence that will keep both LGBT Americans and *all* Americans free and safe, both at home and abroad.

Courts and lawmakers need only harken back to the recent past—the racial civil rights movement—to realize that both foreign policy and national security are real and important reasons to pass domestic civil rights protections.<sup>369</sup> There are direct ties to contemporary world events vis-à-vis the American LGBT civil rights movement. Today’s War on Terror is prodemocratic and antitheocratic; it is a war about an ideology more than anything else. As noted above, the United States has taken many public stands for LGBT civil rights and against homophobia around the world.<sup>370</sup> It also has publicly condemned the EITN’s theocratic missions as being contrary to the American values of pluralism and freedom.<sup>371</sup> If the Religious Right succeeds in its quest for anti-Establishment zones of exemption, its victories will provide grist for the EITN propaganda mills. Just as those in the foreign policy and national security communities realized their interest in the racial civil rights movement of the 1950s and 1960s, so too should the contemporary foreign policy and national security communities realize their interest in LGBT civil rights. Those in the foreign policy and national security communities should realize this and should seize upon and leverage the foreign policy and national security interests in full civil rights for LGBT Americans. These interests converge with the interests of the LGBT community in a way that Bell’s interest convergence theory predicts positive outcomes for LGBT civil rights legislation and court victories.

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against these types of bills when the interests behind that “no” vote are foreign policy and national security.

<sup>368</sup> *Why the Equality Act?*, *supra* note 365.

<sup>369</sup> *See supra* Section II.B.

<sup>370</sup> *See supra* Section III.D.

<sup>371</sup> *See supra* Section III.D.

## CONCLUSION

The origin of the American experiment is rooted in religious freedom, which is realized only through meaningful religious pluralism. The American colonies were established to achieve liberation from European governments that merged religion into sovereign power.<sup>372</sup> America needs to remember and stay true to that history today when we face the reality that the Religious Right seeks to supplant religious pluralism with its own singular religious vision.<sup>373</sup> We must ask, what is the groundwork we want to lay for “religious freedom” abroad and at home—religious pluralism or theocracy?

We should all heed the warning that “[a]nyone who doubts either the intent or the ability of the Religious Right to reshape the landscape of religious liberty in America isn’t paying attention.”<sup>374</sup> Upon heeding that warning, we must recognize the convergence of interests that exists between LGBT civil rights advocates and the American foreign policy and national security communities, and leverage those interests to ensure formal equality and dignity for LGBT Americans, which will simultaneously enhance the foreign policy and national security interests of *all* Americans.

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<sup>372</sup> CLARKSON, *supra* note 15, at 26 (quoting academic Marci Hamilton).

<sup>373</sup> *Id.* (noting that the Religious Right “is to impose a conservative Christian social order inspired by religious law, in part by eroding pillars of undergirding religious pluralism that are integral to our constitutional democracy,” *id.* at vi).

<sup>374</sup> *Id.* at iv.